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5

REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

VOLUME XXXIX

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE SECOND DISTRICT
IN DECEMBER, 1890; JANUARY, MAY, JUNE, JULY AND AUGUST,
1891; IN THE FOURTH DISTRICT IN FEBRUARY AND
JUNE, 1891; IN THE THIRD DISTRICT
IN FEBRUARY, 1889, JANUARY
AND JUNE, 1891.

REPORTED BY
EDWIN BURRITT SMITH
OF THE CHICAGO BAR

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APPELLATE COURTS OF ILLINOIS

DURING THE TIME OF THESE REPORTS.

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JOSEPH E. GARY, <i>Judge</i> ,	Chicago.
ARBA N. WATERMAN, <i>Judge</i> ,	Chicago.
THOMAS G. McELLIGOTT, <i>Clerk</i> ,	Chicago.

SECOND DISTRICT.

C. B. SMITH, <i>Presiding Judge</i> ,	Champaign.
CLARK W. UPTON, <i>Judge</i> ,	Waukegan.
LYMAN LACEY, <i>Judge</i> ,	Havana.
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THIRD DISTRICT.

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GEORGE W. PLEASANTS, <i>Judge</i> ,	Rock Island.
GEORGE W. WALL, <i>Judge</i> ,	Du Quoin.
GEORGE W. JONES, <i>Clerk</i> ,	Springfield.

FOURTH DISTRICT.

J. J. PHILLIPS, <i>Presiding Judge</i> ,	Hillsboro.
OWEN T. REEVES, <i>Judge</i> ,	Bloomington.
N. W. GREEN, <i>Judge</i> ,	Pekin.
JOHN W. BURTON, <i>Clerk</i> ,	Mt. Vernon.

TABLE OF CASES.

A

Allison v. Maley	85
Anderson v. Thiele	476
Arnold, Freeman v	216
Aschenbrenner, Westgate v	263
Aschenbrenner, Westgate v	266
Atlanta Nat. Bank, Bevan v	577
Aultman & Co. v. Silvis	164
Austin, Westphal v	230
Ayers, C. P. & St. L. Ry. Co. v	607

B

Baer v. Knewitz	470
Bailey, Dwelling House Ins. Co. v	488
Bailey v. Ferguson	91
Barton v. Harris	106
Baum, Woodburn v	269
Bermond, Mississippi Valley Man'f'r's Mut. Ins. Co. v	267
Bevan v. Atlanta Nat. Bank	577
Blain v. Desrosiers	50
Block, Sundmacher v	553
Board of Education, Corn v	446
Bradford, O'Leary v	182
Brechon v. Duis	258
Bridges v. People	656
Brockway, Burlington Ins. Co. v	43
Brooks, City of Mt. Vernon v	426
Brotherhood of R. R. Brakemen v. Knowles	47
Brownlee v. Village of Alexis	135
Bunn, Oberne, Hosick & Co. v	122
Burlington Ins. Co. v. Brockway	43
Burnett v. Snapp	237
Burry, Town of Sheldon v	154

O

Caldwell v. Evans.....	613
Campbell v. Magruder.....	604
Carberry v. People.....	506
Challis, Wilson v.....	227
Chase v. Nelson.....	53
Cherry, City of Jacksonville v.....	617
Chicago & A. R. R. Co. v. Matthews.....	541
Chicago, B. & Q. R. R. Co. v. Evans.....	261
Chicago P. & St. L. Ry. Co. v. Ayers.....	607
Chicago Sash Door and Blind Man'f'g Co. v. Shaw.....	260
Chicago Wilmington & Vermillion Coal Co. v. Peterson.....	114
Christison, L. E. & W. R. R. Co. v.....	495
City of Dixon, Morehouse v.....	167
City of East St. Louis, E. St. L. Union Ry. Co. v.....	398
City of Henry, Yaeger v.....	21
City of Jacksonville v. Cherry.....	617
City of Mt. Vernon v. Brooks.....	426
City of Olney v. Riley.....	401
City of Pana v. Humphreys.....	641
City of Rock Island v. McEniry.....	218
City of Vandalia v. Ropp.....	34
Collier, Tobin v.....	478
Common v. People.....	31
Connecticut Mut. Ins. Co. v. Smith.....	569
Conroy, T. St. L. & K. C. R. R. Co. v.....	351
Consolidated Coal Co. of St. Louis v. Peers.....	453
Cooper, Herdman v.....	350
Corn v. Board of Education.....	446
County of Du Page v. Martin.....	298
County of McHenry v. Town of Dorr.....	240
Craft, Mettler v.....	193
Crohen v. Ewers and Snyder.....	34

D

Davis, People v.....	162
Davis, Village of Wapella v.....	592
Davis v. Nichols.....	610
Deering & Co. v. Washburn.....	434
Desrosiers, Blain v.....	50
Dines v. People.....	565
Doctor, Rippentrop v.....	120
Downey, Dwelling House Ins. Co. v.....	524
Dowse, Wilson v.....	127
Duis, Brechon v.....	258
Dunlap, Magers v.....	618
Dwelling House Ins. Co. v. Bailey.....	488
Dwelling House Ins. Co. v. Downey.....	524

TABLE OF CASES.

11

E

East St. L. & C. R. R. Co., St. L. & C. R. R. Co. v.....	354
East St. L., Union Ry. Co. v. City of East St. Louis.....	398
Edwards v. Martin.....	145
Eldridge, Henning v.....	273
Evans, Caldwell v.....	613
Evans, C. B. & Q. R. R. Co. v.....	261
Ewers and Snyder, Crohen v.....	34

F

Fellows, St. Louis Bridge Co. v.....	456
Freeman v. Arnold.....	216
Foval v. Foval.....	644
Ferguson, Bailey v.....	91

G

Gable, Goldsbrough v.....	278
German Ins. Co. v. Miller.....	633
Gillett v. Ins. Co. of North America.....	284
Goldsbrough v. Gable.....	278
Gould v. Warne.....	279
Grape Creek Coal Co. v. Spellman.....	630

H

Hamilton, McCrory v.....	490
Ham v. Peery.....	341
Hanks v. People.....	223
Harris, Barton v.....	106
Hart, Phenix Ins. Co. v.....	517
Hauptmann, Robinson Floating Museum Co. v.....	441
Hawkins, St. L. & T. H. R. R. Co. v.....	406
Headlee, Piper v.....	93
Henning v. Eldridge.....	273
Herdman v. Cooper.....	330
Herman, P. & P. Union Ry. Co. v.....	287
Hess v. Keiser.....	493
Hewitt v. Hexter & Co.....	585
Hexter & Co., Hewitt v.....	585
Huber v. Schmach.....	229
Humphreys, City of Pana.....	641
Hodge, Kerr v.....	546
Hossack v. Moody.....	17
Hoyle, Truesdale Mfg. Co. v.....	532

I

Illinois C. R. R. Co. v. Light.....	530
Illinois C. R. R. Co. v. Slater.....	69
Insurance Co. of North America, Gillett v.....	284
International Bank of Chicago v. Van Kirk.....	23

J

Jamison, Martin v.....	248
Johnson v. Stephenson.....	88
Johnson v. Stinger.....	180
Johns v. McQuigg.....	609

K

Keiser, Hess v.....	493
Kerr v. Hodge.....	546
Knewitz, Baer v.....	470
Knowles, Brotherhood of R. R. Brakemen v.....	47

L

L. E. & W. R. R. Co. v. Christison.....	495
L. E. & W. R. R. Co. v. Wills.....	649
Light, I. C. R. R. Co. v.....	530
Lillard, Town of Bloomington v.....	616
Litchfield Car & Machine Co. v. Romine.....	642
Lusk v. Parsons.....	380
Luthy v. Waterbury.....	317

M

Magers v. Dunlap.....	618
Magruder, Campbell v.....	604
Maley, Allison v.....	85
Martin, County of DuPage v.....	298
Martin, Edwards v.....	145
Martin v. Jamison.....	248
Matthews, C. & A. R. R. Co. v.....	541
McCrary v. Hamilton.....	490
McDole v. McDole.....	274
McEniry, City of Rock Island v.....	218
McGillis v. Willis.....	311
McQuigg, Johns v.....	609
Mealand, Van Nostrand v.....	178
Mettler v. Craft.....	193
Metz v. Wood.....	131
Meyerott, Osborne & Co. v.....	425
Miller, German Ins. Co. v.....	633
Miller, St. Louis Bridge Co. v.....	366
Miller v. Rollen.....	350
Milwaukee Harvester Co., Windils v.....	521
Minter v. People.....	438
Mississippi Valley Manf'rs Mut. Ins. Co. v. Bermond.....	267
Moody, Hossack v.....	17
Morehouse v. City of Dixon.....	107
Morris, Steyer v.....	382
Muddy Valley Mining & Manf'g Co. v. Phillips.....	376
Mutual Accident Ass'n of the Northwest v. Tuggle.....	509

TABLE OF CASES.

13

N

Nealon v. People	481
Nelson, Chase v	53
New Home Life Ass'n of Illinois v. Owen	413
Nichols, Davis v	610
Northrup v. Smothers	588
Nuernberger v. Von Der Heidt	404

O

Oberne, Hosick & Co. v. Bunn	122
O., I. & W. Ry. Co. v. People	473
O. & M. Ry. Co. v. Ramey	409
O'Leary v. Bradford	182
Osborne & Co. v. Meyerott	425
Owen, New Home Life Ass'n of Illinois v	413

P

Parmenter, Plano Man'fg Co. v.	270
Parsons, Lusk v	380
Peterson, Chicago, Wilmington & Vermillion Coal Co. v	114
Peers, Consolidated Coal Co. of St. Louis v	453
Peery, Ham v	341
People, Bridges v	656
People, Carberry v	506
People v. Davis	162
People, Dines v	565
People, Hanks v	223
People, Minter v	438
People, Nealon v	481
People, Common v	31
People, O. I. & W. Ry. Co. v	473
People, Smith v	238
P. & P. Union Ry. Co. v. Herman	287
Peters, Schreiner v	309
Phenix Ins. Co. v. Hart	517
Phillips, Muddy Valley Mining & Manf'g Co. v	376
Piper v. Headlee	93
Pitts, Wilderman v	416
Plano Man'fg Co. v. Parmenter	270
President, etc., of Rushville, Town of Rushville v	503
Purcell v. Town of Bear Creek	499
Pusey, Timmerman v	523

R

Ramey, O. & M. Ry. Co. v	409
Razor v. Razor	527
Redden, Ward v	643
Riley, City of Olney v	401
Rippentrop v. Doctor	120

Robinson Floating Museum Co. v. Hauptmann.....	441
Rockford Ins. Co. v. Wright.....	574
Rollen, Miller v.....	350
Romine, Litchfield Car & Machine Co. v.....	642
Ropp, City of Vandalia v.....	344
Rowland v. Swope.....	514
Russell, St. L. A. & T. H. R. R. Co. v.....	443
Russell v. Thomas.....	158

S

St. L. A. & T. H. R. R. Co. v. Hawkins.....	406
St. L. A. & T. H. R. R. Co. v. Russell.....	443
St. L. A. & T. H. R. R. Co. v. Walker.....	388
St. L. & C. R. R. Co. v. E. St. L. & C. R. R. Co.....	354
St. L. Nat. Stock Yards v. Tiblier.....	422
St. Louis Bridge Co. v. Fellows.....	456
St. Louis Bridge Co. v. Miller.....	366
Sample, Wilmerton v.....	60
Sauerbier v. Union Central Life Ins. Co.....	620
Schmacht, Huber v.....	229
Schreiner v. Peters.....	309
Shafer, Steel v.....	185
Shaw, Chicago Sash Door and Blind Manf'g Co. v.....	260
Sheets v. Wetsel.....	600
Silvis, Aultman & Co. v.....	164
Slater, Illinois Central Ry. Co. v.....	69
Smothers, Northrup v.....	588
Smith, Conn. Mut. Ins. Co. v.....	569
Smith v. People.....	238
Snapp, Burnett v.....	237
Speer, Wabash R. R. Co. v.....	599
Spellman, Grape Creek Coal Co. v.....	630
Steel v. Shafer.....	185
Stephenson, Johnson v.....	88
Steyer v. Morris.....	382
Stinger, Johnson v.....	180
Sundmacher v. Block.....	553
Swope, Rowland v.....	514

T

Thiele, Anderson v.....	476
Thomas, Russell v.....	158
Tiblier, St. Louis Nat. Stock Yards v.....	422
Timmerman v. Pusey.....	523
Tobin v. Collier.....	478
Toledo, St. L. & K. C. R. R. Co. v. Conroy.....	351
Town of Bear Creek, Purcell v.....	499
Town of Bloomington v. Lillard.....	616

TABLE OF CASES.

15

Town of Dorr, County of McHenry v.....	240
Town of Rushville v. President, etc., of Rushville.....	503
Town of Sheldon v. Burry.....	154
Truesdale Mfg. Co. v. Hoyle.....	532
Tuggle, Mut. Accident Ass'n of the Northwest v.....	509
Turner, Wilbur v.....	526

U

Union Central Life Ins. Co., Sauerbier v.....	620
---	-----

V

Van Kirk, International Bank of Chicago v.....	23
Van Nostrand v. Mealand.....	178
Vetten v. Wallace.....	390
Village of Alexis, Brownlee v.....	135
Village of Wapella v. Davis.....	592
Von Der Heidt, Nuernberger v.....	404

W

Wabash R. R. Co. v. Speer.....	599
Walker, St. L., A. T. H. R. R. Co. v.....	388
Wallace, Vetten v.....	390
Ward v. Redden.....	643
Warne, Gould v.....	279
Washburn, Deering & Co. v.....	434
Waterbury, Luthy v.....	317
Westgate v. Aschenbrenner.....	263
Westgate v. Aschenbrenner.....	266
Westphal v. Austin.....	230
Wetsel, Sheets v.....	600
Wilber v. Turner.....	526
Wilderman v. Pitts.....	416
Wills, L. E. & W. Ry. Co. v.....	649
Willis, McGillis v.....	311
Wilmerton v. Sample.....	60
Wilson v. Challis.....	227
Wilson v. Dowse.....	127
Windils v. Milwaukee Harvester Co.....	521
Woodburn v. Baum.....	269
Wood, Metz v.....	131
Wooley v. Yarnell.....	595
Wright, Rockford Ins. Co. v.....	574

Y

Yaeger v. City of Henry.....	21
Yarnell, Wooley v.....	595

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—MAY TERM, 1890.

HENRY L. HOSSACK
V.
MOSES Y. MOODY.

*Negotiable Instruments—Note—Payment—Instrument Comprising both
Receipt and Contract—Parol Evidence.*

A written instrument may be both a receipt and a contract, in which case that portion operative as a receipt may be contradicted or explained like any other receipt.

[Opinion filed December 8, 1890.]

APPEAL from the County Court of La Salle County; the
Hon. FRANK P. SNYDER, Judge, presiding.

Mr. FRANK G. ALLEN, for appellant.

Messrs. CAREY & TRAINOR, for appellee.

UPTON, J. This was a suit in assumpsit originally commenced before a justice of the peace in La Salle County, upon a promissory note of the following tenor, viz.:

“ OTTAWA, Dec. 7th, 1880.

“ For value received I promise to pay to the order of H.

(17)

L. Hossack one hundred dollars with interest at eight per cent per annum.

Signed, "M. G. MOODY."

Upon trial before the justice of the peace the appellee, defendant below, had judgment, and appellant took an appeal to the County Court of La Salle County, in which latter court a trial was had before that court and a jury, resulting in a verdict for appellee of "no cause of action," upon which, after overruling a motion for a new trial, judgment was rendered, and a further appeal was taken to this court, and the record is now before us.

Appellant's counsel submits three propositions, upon which are based the grounds for reversing the judgment of the court below. 1st. The trial court erred in allowing parol explanation of a receipt in writing because the receipt embodied a contract in the same writing. 2d. The trial court erred in giving the jury appellee's instruction No. 1. 3d. The verdict is against the weight of the evidence.

It appears that appellant and appellee, for some years prior to the date of the note in suit, had business relations and dealings together, and some joint interest in a feed yard in Ottawa, La Salle county. Appellee contends that in July, 1880, he gave appellant his promissory note for \$90.92 on interest; that subsequent thereto, and on the 7th of December, 1880, a settlement was had between the parties, of their business affairs to that date, including the note of \$90.92 and interest thereon from its date until that time, and certain accounts on book, and that at that time and settlement the note in suit was executed, which included the \$90.92 note of July, 1880, and interest thereon, and the balance due on account between the parties, and the \$90.92 note was by agreement of the parties paid by including the same in the note in suit, and that some time thereafter, the note in suit was in fact paid to appellant in full, but that at the time of such payment the note could not be found, or was supposed to be lost, and neither the note for \$90.92 nor the \$100 note substituted therefor, were either of them delivered to appellee; that some time in 1888 appellant and appellee, being then

about to sell and convey their interest in the feed yard, had a final settlement to that date, and appellee refused to convey his interest in the feed yard unless the appellant would give appellee a receipt showing the payment of the note now in suit. It is conceded that the note for \$90.92 was included in another note given by appellee to appellant, but whether included in the note in suit, or in another, was a question sharply controverted on the trial below. In order to comply with appellee's wishes, and to effect the sale of the feed yard, the appellant and appellee stated the matter to one Thos. E. Mackinlay, an attorney at law, who at their request, drew a receipt, which was executed by appellant and Medora Hossack, his wife, and delivered to appellee, of the following tenor: "Received of Moses T. Moody, payment of a certain note of ninety dollars and ninety-two cents, which has been lost or mislaid, and we severally and jointly agree that if it shall come into the possession of any third party, we will defend said Moody against any suit brought for its collection in the hands of such third party," and bore date on or about July —, 1888. This note of \$90.92 was spoken of by both parties, in their controversies, as the \$100 note. Appellant, in his evidence, admits that this \$90.92 was paid to him, by being included in another note given by appellee to him, but he claims that it was included in a note of \$114.38, dated December 8, 1880, and not in the note in suit, which last named note appellant contends was given for money loaned, which is denied by appellee.

From the foregoing statement it will be seen that the questions of fact between the parties were sharply defined in the courts below, and the testimony sharply conflicting and irreconcilable in reference thereto.

First. Was the paper introduced in evidence (by parol evidence of its contents, the original having been lost or mislaid) in the nature of a receipt, so that it was subject to explanation by parol? It is conceded that a mere receipt is always subject to explanation or contradiction even by parol, but the rule is otherwise as to written agreements or contracts generally. In the case at bar, the paper writing introduced

was both a receipt and an agreement, or contract for indemnity. We perceive no reason why a written instrument may not be both a receipt and an agreement or contract, in which case that portion operative only as a receipt might be explained or contradicted, like any other receipt; but not so as to that part which contains the contract or agreement of the parties; that can not be so contradicted. This we understand to be the view taken by the Supreme Court in *McCloskey v. McCormick et al.*, 37 Ill. 72. There the question was, whether the bill of sale offered in evidence was in the nature of a receipt, and subject to explanation, etc. The court say, "In that respect it speaks its own language." In the case at bar there is no attempt to enforce the agreement of indemnity, but simply to show the payment of the note to appellant, the original payee thereof. As to that issue, it was simply a receipt.

Second. The instruction given for appellee, No. 1, is claimed to be erroneous for the reason, as is said, that it assumes "that the receipt was given in settlement of all outstanding notes between the parties," when in fact there was no evidence of that character in the record. We do not think the instruction obnoxious to the criticism made by counsel. Moody, the appellee, testified as shown by the abstract that "the settlement upon which the receipt in question was given "was intended to cover the note in suit and *square up all claims between appellant and appellee.*" This, if true, would of course include all outstanding notes held by Hossack against Moody, as fully as stated in the instruction. The residue of the instruction is as to the question of the admissibility of the receipt in evidence at all, for the reason before stated and which objection we have shown is not well taken. There was no error in this instruction apparent to us.

Third. We have carefully examined the evidence in this case, and while it is sharply conflicting, we are not able to say the jury were not warranted therefrom in finding the verdict rendered in the case, or that the verdict is not fully justified by the evidence.

There being no sufficient error in this record of a reversible character appearing to us, the judgment of the court below must be affirmed.

Judgment affirmed.

Yaeger v. City of Henry.

HENRY YAEGER
V.
THE CITY OF HENRY.

Jurisdiction—Absence of Bill of Exceptions—Presumptions in Favor of Judgment.

1. Where a party appears and submits himself to the jurisdiction of the court it is of no importance whether the summons was void or not, or whether in fact there was any process at all.

2. In the absence of a bill of exceptions an appellate court will presume that every fact necessary to bring the case within the jurisdiction of the court and establish a cause of action was proven on the trial.

[Opinion filed December 8, 1890.]

APPEAL from the Circuit Court of Marshall County; the Hon. T. M. SHAW, Judge, presiding.

Mr. FRED S. POTTER, for appellant.

Mr. T. F. CLOVER, for appellee.

UPTON, J. In this case upon motion of counsel for appellee, the bill of exceptions filed herein was stricken from the record. Appellant now seeks to reverse the judgment below for alleged error manifest upon the face of the record.

Those errors are:

1st. That the trial court did not acquire jurisdiction of the person of the defendant.

2d. The court erred in trying the cause and entering judgment therein, without issue being joined.

3d. The court erred in trying the case without a jury.

4th. The court erred in trying the case at all.

The record recites that the appellant came by his attorney, and agreed to, and did, submit his case to the court below for trial

without a jury. The record further shows that the case was in fact tried by the court without a jury. It recites that the parties to the suit "came by their respective counsel, and the court having heard the evidence and arguments of counsel, found the defendant guilty," etc. The Supreme Court held in *Baldwin v. Murphy*, 82 Ill. 485, when a party appears and submits himself to the jurisdiction of the court, it is a matter of no consequence whether the summons was void or not, or even whether there was in fact any process at all. It is a rule of general application that in the absence of a bill of exception showing all the evidence in the case, it will be presumed in support of the judgment that there was sufficient evidence before this court to warrant it. *Wilson v. McDowell*, 65 Ill. 522; *Treichel v. McGill*, 28 Ill. App. 78. It was held, in the absence of a bill of exceptions preserving the evidence, the Supreme (or Appellate) Court *will presume* that every fact necessary to bring the case *within the jurisdiction of the court and establish a cause of action, was proven, and established on the trial*. See *Tug Boat E. P. Dorr v. Waldron*, 62 Ill. 222; *Goodrich v. City of Minonk*, 62 Ill. 122; *Davis v. Taylor*, 41 Ill. 407. In *Rich v. Hathaway*, 18 Ill. 548, it was held, that all intendments will be in favor of the legality of the proceedings in courts of general jurisdiction, where it depends upon matter of fact, unless the existence of such facts is denied and shown by bill of exceptions. To the same effect is *Graham v. Dixon*, 3 Scam. 115. It is apparent therefrom, there being no bill of exceptions, under the legal presumptions attaching to judgments of the character before us, we must presume in favor of appellee, and the proper and legal action of the trial court and the judgment below must be affirmed.

Judgment affirmed.

International Bank of Chicago v. Vankirk.

THE INTERNATIONAL BANK OF CHICAGO ET AL.

V.

HENRY C. VANKIRK ET AL.

Gambling Transaction—Paper Tainted Thereby Void—Renewal and Transfer Immaterial.

Under the laws of this State all manner of gambling obligations are void in the hands of everybody, and such obligations can never be made valid by any renewals or transfers to innocent purchasers. Therefore a trust deed, given to secure a note given in payment of a gambling debt, though once renewed, and transferred to the hands of an innocent purchaser, is void.

[Opinion filed December 8, 1890.]

APPEAL from the Circuit Court of Kankakee County; the Hon. N. J. PILSBURY, Judge, presiding.

Messrs. D. H. PADDOCK and BOTTUM & SWARTZ, for appellants.

The court below held that the said trust deed is tainted with illegality, and therefore void. In this we think the court erred.

The illegality of a thing or transaction consists in that it is either *malum in se* or *malum prohibitum*, and any illegality which may attach to dealing in "options" or "future deliveries" of a commodity in the marts of trade does not arise from the fact of such transactions being *mala in se* and contrary to the common law of the land, but that, for reasons of public policy, the sovereignty of the State has seen fit to forbid them and make them *mala prohibita*. These considerations are presented for the purpose of urging a strict construction of any prohibitory statutes which may apply to dealings of this character, and that they be not enlarged to cover facts not clearly within them.

The question as presented by the record in this case has

never been before the courts of appellate jurisdiction in this State before, and little assistance can be had from *stare decisis*.

The position taken by appellants is that whatever may have been the status of the original notes on account of illegal consideration, that such illegality was purged and did not attach to the second transaction when the later notes and trust deed were made by the defendant at the instance of the International Bank, an innocent holder for value.

Here was a new contract entered into by Vankirk with the bank, in which Vankirk executed new notes, and also a trust deed to secure them, in which he promises to pay the amount of said notes, in consideration of the old notes being canceled and delivered up, and in consideration of the sum the bank had paid for the notes. True, the second notes were made payable to A. C. Helmholz, but so they might have been made payable, if the parties saw fit, to any third person. The transaction was entirely and exclusively between the International Bank and Vankirk, and a good and valuable consideration moved between them. Vankirk wanted those old notes and that old matter settled; the bank wanted security for a sum of money which was rightfully due it, and each got what it wanted. There was no illegality in that transaction. Of course, if we go back of this to the first notes, illegality may be found, but the law considers proximate and not remote causes. Chitty on Contracts, 730, says: "The test as to whether a demand connected with an illegal transaction be capable of being enforced at law, is whether the plaintiff must rely on such transaction in order to establish his case."

The case of Calvert v. Williams, a North Carolina case, is, we think, an authority in point, although in that case the second note was made payable to the assignee of the first note. There the court says: "In our case the maker executed the second note to Calvert, who was the indorsee, for valuable consideration and without notice. This second note was given to secure the price paid by Calvert for the first note, and not to secure the payment of the money which Christmas had won; for the purpose of making it, must be

International Bank of Chicago v. Vankirk.

referred to the proximate and not the remote cause. The consideration, therefore, is not tainted by the illegality which vitiated the first note. His honor erred in failing to note the distinction." *Calvert v. Williams*, 64 N. C. 168.

A strict construction of the statute upon which appellees rest their defense will lead, we think, to the conclusion that the statute is not sufficiently broad to include within it the facts of this case. That our Supreme Court is disposed to construe this statute strictly is shown, we think, by the case of *West v. Carter*, 129 Ill. 249, which was a case in which the bondsman on an appeal bond filed his bill in chancery and sought to have the bond canceled and the original judgment declared void on the ground of illegality, and that the defendant, the appellant in the case above, be enjoined from taking judgment on the bond; but the court held that appellee, the complainant below, had no such interest in the judgment as entitled him to the relief asked under Sec. 131 Crim. Code, R. S.

Furthermore, this trust deed was made with the full understanding and consent of the defendant with the complainants for the very purposes which are now sought to be enforced, and on the principle laid down in the case of *McIntire v. Yates*, 103 Ill 497, he is estopped from setting up any equities existing between himself and Helmholz.

Messrs. JAMES N. ORR, B. F. GRAY and H. K. WHEELER,
for appellees.

The statute expressly provides that all notes or other evidence of indebtedness, contracts, agreements, mortgages or other securities given, granted or entered into, "where the whole or any part of the consideration thereof" shall be for money, property or other valuable thing, won at gambling, or which grows out of a gambling contract, are void. Secs. 178, 179 and 180, Chap. 38, Revised Statutes.

It is provided, further, that all judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements and other conveyances, etc., may be set aside and

vacated by a bill of equity filed for that purpose by the person so granting or giving the same, or by any creditor, heir, devisee, purchaser or other person. Section 183, Chap. 38, Revised Statutes.

These complainants are seeking to enforce a mortgage, and the rule is so well settled that the assignee of a mortgage takes it subject to all equities between the parties to it as to need no citation of authorities. The courts of this State have held that the innocent holder of a note or draft, the consideration of which was money growing out of a gambling transaction, can not recover on the same. *Pearce v. Foote*, 113 Ill. 228; *Chapin et al. v. Dake*, 57 Ill. 296; *Gilbert v. Holmes*, 64 Ill. 548.

The statutes of this State have declared that all notes and mortgages, or other evidences of indebtedness, growing out of these transactions, are not merely voidable but are void and of no effect, and it is difficult to see upon what principle the renewal of a void note, one which had no standing of any kind in law, could make it a valid, legal obligation.

The statute also provides that "No assignment of any bill, note, bond, covenant, agreement, judgment, mortgage, or other security, on conveyance as aforesaid, shall in any manner affect the defense of the person giving, granting, drawing, entering note or executing the same, or the remedies of any person interested therein." Sec. 184, Chap. 38, R. S.

It is next urged that this was a "new contract," entered into by Vankirk with the bank, in which Vankirk executed new notes and also a trust deed to secure them, in which he promised to execute new notes in consideration of the old notes being delivered up; and it is insisted in argument that there was no illegality in the transaction. As before stated, we challenge this statement of the case. The bank was not a party to this contract. The maker of the notes was Henry C. Vankirk; the payee of the notes was A. C. Helmholtz; and this contract was therefore between the maker of the note and the payee. The bank was not even privy to the contract. It was not known in the transaction. But assuming that the bank was a party to this contract, it being con-

International Bank of Chicago v. Vankirk.

ceded that the consideration for the original notes grew out of a gambling transaction, and that these notes were void, being contrary to law, we insist that the first contract being void, the renewal of it did not change its legal status; that such is the elementary rule of law. "Where the consideration is altogether illegal it is sufficient to sustain a promise and the agreement is wholly void. This is so equally whether the law which is violated be statute law or common law." Parsons on Contracts, Vol. 1, page 458, fifth edition.

"Illegality of a consideration avoids a mortgage whether it consists of violation of a common law or of a statute." Jones on Mortgages, Sec. 617.

"As a general rule, where the undertaking upon which the plaintiff relied was either upon an unlawful consideration or to do an unlawful act, the contract is void; and this whether the contract be illegal as being against the rules of the common law or the express provisions or general policy of any particular statute." Munsell v. Temple, 3 Gilman, 93; Wheeler v. Russell, 17 Mass. 237.

We therefore submit that as to the question of making the contract, it being on its face between Helmholtz and Vankirk, that this court will presume that they were the actual parties to it.

Second. That the evidence of Vankirk is that they were the actual parties to the contract, and he is corroborated by the document itself.

The evidence of Schmid is that the contract was taken in the name of Helmholtz for the purpose of securing his liability as an indorser, when the bank already had his liability as an original debtor, and it must be evident that this was a mere pretext and is not supported by any circumstances connected with the case.

As to the indorsement being void in the hands of an innocent holder, see Commercial National Bank v. Spaid, 8 Ill. App. 493.

Tenny v. Foote, 4 Ill. App. 594, was a board of trade case, and is, we think, directly in point in this case. The Appellate Court, page 601, says: "It is immaterial whether

plaintiffs be *bona fide* holders of the note or not, if the contract between Hooker & Co. and Foote was a gambling transaction and within the statute against gambling, because the statute itself renders void all contracts, notes, bills or other securities, whether the whole or any part of the consideration arises out of a gambling transaction."

Section 136, Criminal Code, declares "That no assignment shall in any manner affect the defense of the person making such note or bill." Chapin v. Dake, 57 Ill. 296, before cited. Such a thing as making valid by giving the new notes and trust deed would be an avoidance of the statute, and we consider it wholly untenable.

Finally. Even though the court should believe that the contract of renewal of the notes was between Vankirk and the International Bank, the original contract being void, that it is an insufficient consideration upon which to base a new contract, and that the bank gets no greater right under the peculiar provisions of our statute than did Helmholz.

C. B. SMITH, P. J. This was a bill in chancery brought by appellant against appellees to foreclose a certain trust deed, given by Henry C. Vankirk to Godfrey Schmid as trustee, to secure two notes, dated October 30, 1884, each for the sum of \$1,342, due respectively in nine and eighteen months after date, with six per cent interest. The notes were payable to the order of A. C. Helmholz and by him indorsed to the International Bank of Chicago. These notes were renewals of two notes, dated May 1, 1884, one for \$1,300, and one for the sum of \$1,306.25, both of which were also payable to A. C. Helmholz and executed by Henry C. Vankirk. These first notes were assigned before maturity to Michael Schweisthal for a valuable consideration and as collateral security to the bank. Not being paid at maturity the notes first given were renewed and were executed to the same payees as the first notes, and signed by the same maker, Henry C. Vankirk, and before the maturity of these renewed notes they were assigned by Helmholz to the bank as collateral security and for a valuable consideration and without any actual notice to

International Bank of Chicago v. Vankirk.

the bank of any defense to the notes. The mortgage now sought to be foreclosed was executed to secure these two renewed notes of \$1,342 each.

The original and amended bills were answered. The answer set out that the original consideration for which the two first notes were given, was for certain losses sustained by Vankirk on certain option deals in grain in Chicago, growing out of gambling contracts in grain, on the Board of Trade, and that the option deals and gambling contracts were had and carried on with A. C. Helmholz, and that the sum of these two notes represented the amount of loss sustained by Vankirk in his dealings with said Helmholz, and that the original notes and their renewals and the trust deed given to secure them were all to secure the payment of the original amount lost by Vankirk in his option deals and gambling contracts with Helmholz. In addition to the answer Vankirk also filed a cross-bill, giving a history of the transaction as set up in the original and amended bills, and the answers thereto, and charging that the consideration of said notes and the trust deed was fraudulent and void, and the consideration as stated in the answer, and alleged that the trust deed was a cloud on his title, and asked to have it canceled. Issues were joined and the cause heard by the court, and decree finding the facts to be as set up in the answer and cross-bill; and a decree that the original and amended bills be dismissed, and that the relief asked for in the cross-bill be granted, and the trust deed and notes canceled. From that decree this appeal is prosecuted.

The proof below established the fact that these notes represented the losses of Vankirk, growing out of his gambling transactions on the Board of Trade with A. C. Helmholz. Indeed, we do not understand appellant as seriously denying that the original consideration of these notes was illegal, fraudulent and void, as being the product of gambling in grain on the Board of Trade. The contention of appellant is that conceding the notes to have been tainted originally with an illegal consideration, still the renewal of the same to the same payee, and by him immediately indorsed to the bank for a valuable consideration, and without notice of the illegal con-

sideration, would enable the bank to hold them as an innocent purchaser free from the taint of the original consideration. We do not concur with appellant in this view of the law. We think the renewal of these notes gave them no new merit, nor in any manner whatever removed or changed the illegal consideration of the first notes. The consideration for the new notes was the same as in the old ones. Giving the trust deed to secure them did not change the illegal character of the consideration. It is a familiar rule of law that an assignee of a mortgage or trust deed takes it subject to all the equities of the mortgagor, and the assignee of the mortgagee can not occupy any better position toward the mortgaged property than the mortgagee himself. It is also well settled that there can be no innocent holders of promissory notes or mortgages, where it appears that the consideration of such notes and mortgages was the result or grew out of a gambling transaction. All such contracts are void in the hands of all persons; *Pearce v. Foote*, 113 Ill. 228; *Chapin v. Dake*, 57 Ill. 296. *The Bank v. Spaid*, 8 Ill. App. 493.

Sections 178, 179 and 180, Chap. 38, Rev. Stat. (Starr & Curtis), declare all manner of gambling contracts, including those in grain, to be absolutely null and void. Sec. 183, Chap. 38, provides that any and all such contracts, even if reduced to judgments, may be set aside and vacated in a court of equity; and section 184 of the same act provides that no assignment of any such note, mortgage, judgment or other form of contract, shall defeat or affect the defense of any person so having executed or delivered any of said gambling contracts. It will thus be seen that under the broad and sweeping language of our statute, all manner of gambling obligations are absolutely void in the hands of everybody, and that such obligations can never be made valid and legal by any possible changes to which they may be subjected. The original taint of illegality follows them into the hands of all holders, and adheres to them and poisons them in whatever form they may take. The judgment of outlawry is against them in all hands and in all forms. It being clearly proven in this case, and not denied, that the original consid-

Common v. The People.

eration of these notes was the product of gambling in grain and representing losses in option deals, it therefore becomes a matter of no importance how or when this bank became possessed of these notes and this trust deed, nor what they paid for them. We therefore think the decree of the Circuit Court was right, and the decree will be affirmed.

Decree affirmed.

JAMES COMMON
V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Bastardy—Evidence—Immaterial Error.

1. In a prosecution for bastardy, where the evidence was conflicting, it is *held*: That the verdict was sufficiently supported by the evidence.

2. Evidence to show that the prosecuting witness testified differently upon a former trial is competent in such cases, but where it appears that the exclusion of such testimony probably did the defendant no harm, the discrepancy attempted to be shown being immaterial, the court may refuse to reverse the judgment.

[Opinion filed December 8, 1890.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Mr. C. W. RAYMOND, for appellant.

Mr. A. F. GOODYEAR, State's Attorney, for appellees.

C. B. SMITH, P. J. This was a prosecution for bastardy on complaint of Carrie Winkle. On the trial below the defendant was convicted and he now appeals to this court and seeks

a reversal of the judgment. The case was here before us at a former term on the appeal of appellant, and is reported in *Common v. The People ex rel., etc.*, 28 Ill. App. 230. It was then reversed because a majority of this court was of opinion the court erred in refusing to continue the case on motion of appellant. The case was remanded and retried again, resulting in appellant's conviction. The case has now been tried three times before three juries, once in the County Court and twice in the Circuit Court, all resulting alike in the conviction of the defendant. Two grounds only are urged for a reversal of this judgment:

First. That the verdict is contrary to the evidence.

Second. That the court erred in refusing the defendant the right to call witnesses to show the prosecutrix had sworn differently upon a former trial from what she testified to in this trial.

With reference to the first objection it is apparent, from a careful reading of the testimony, that there is an irreconcilable conflict in it. The prosecutrix testifies positively that the child was begotten at the house of one Brumback, where both she and the defendant were, and had been working for some time together as hired servants, on the 31st day of May, 1886, and that the defendant, on the early morning of that day came to her room and had sexual intercourse with her, and that from such intercourse she became pregnant. She also testified that her child was born on the 27th day of February, 1887, and that the defendant was its father. The defendant as positively denies that he has ever had sexual intercourse with the prosecutrix, and denied that he was the father of her child. Other testimony was offered on both sides tending to support the parties for whom the witness was called. We have carefully read the evidence and are satisfied the jury was justified in finding the defendant guilty, if they believe the plaintiff and her witnesses. There is ample evidence in this record to sustain the judgment if the witnesses for the prosecution were believed by the jury. Either the prosecuting witness, Carrie Winkle, or the defendant, James Common, testified deliberately, wilfully and falsely regard-

Common v. The People.

ing the paternity of the child. There is no possibility of a mistake upon that question. The jury heard and saw them both, and they were much better able to determine than we are whether "an artful and designing woman" was trying to overreach and convict an innocent, guileless man, or whether an innocent, unlettered country girl was the victim of the lust and lechery of the defendant, and despoiled of her virtue and character. The defendant has sworn three times that he had no sexual intercourse with Carrie Winkle. Three juries have heard him and his witnesses, and they have refused to believe him, and these three juries have heard Carrie Winkle tell the simple, short story of her seduction and ruin by this defendant, and they have all believed her. It is urged with great earnestness and zeal upon us, that the unsupported oath of a "designing woman" is not sufficient to justify conviction of a man for bastardy in cases where he denies it. Whether this is so must always be a question of fact for the jury and not a question of law for the court. Acts of seduction are generally accomplished in secret and under cover of night, and it is absurd to say that no woman could convict a man of bastardy who could not call some witness to support her, and that upon her failure to do so the denial of her seduction would necessarily require his acquittal.

As to the second objection urged we are of opinion that the evidence offered by appellant and refused by the court was admissible under the authority of *McCoy v. The People*, 71 Ill. 111. On the first trial in the County Court the prosecutrix had testified that she had been up about half an hour before the defendant came to her room, and on the present trial she testified that she had been up about an hour and a half before the defendant came to her room on the morning when she claims the sexual act occurred. The defendant offered to call witnesses to prove what her testimony on that point was on the first trial, but the court rejected the testimony. Even if this evidence had been allowed, the contradiction would have been of so unimportant a character, and upon a point so immaterial, that it is hardly possible that it would have changed the verdict. She did not

on either occasion pretend to be able to fix the exact hour defendant came to her room, or the exact length of time she had been up before he came to her room, nor was the exact time at all material. The material question was whether the defendant was there at all, and not as to the precise hour. So that even if it was error to refuse the evidence offered, it was such an error as could do the defendant no harm. Complaint is also made in the reply brief and argument of appellant that the court erred in refusing to give the last five instructions asked by appellant. The court gave for the defendant fifteen elaborate instructions covering every phase of the law applicable to the defendant's theory of the case, or which could be fairly asked by him. Those refused were either duplications of what had been given or were clearly wrong, and all were properly refused. The judgment is affirmed.

Judgment affirmed.

MICHAEL CROHEN

V.

WILLIAM D. EWERS AND HENRY SNYDER.

Highways—Action to Recover for Discharging Water on Plaintiff's Land—Superior and Servient Estate—Damage—Instructions—Costs of Amended Abstract—Evidence.

1. In any action brought against highway commissioners, in their individual capacities, to recover damages alleged to have been sustained by plaintiff through the drainage of water upon his land, it is *held*: That the evidence failed to show that plaintiff had suffered any appreciable damage from the acts complained of; that plaintiff's land was servient to that from which the water was drained, and that in a state of nature the water flowed in the same direction as it did after the acts complained of were committed.

2. It was competent in the case presented, for qualified witnesses to give their opinion as to whether the plaintiff's land was damaged by the acts complained of.

[Opinion filed December 8, 1890.]

Crohen v. Ewers.

APPEAL from the Circuit Court of Whiteside County; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. J. D. ANDREWS, for appellant.

The owner of high land has no right to open or remove natural barriers, and let onto lower land water which would not otherwise naturally flow in that direction. *Dayton v. Drainage Com'rs*, 128 Ill. 277.

An action lies for flooding the lands of another, even in the least degree, and without any actual prejudice, the law implies damages. *Sedgwick on Meas. Dam.*, Sec. 52; *Pastorious v. Fisher*, 1 Rawl. 27; Cited 15 Ill. 531.

Where a water-course has been diverted in such a way as to cause water to flow upon the land in a place where it otherwise would not have gone, an action will lie; and in such case it is not necessary to prove that the plaintiff has sustained specific damages, or actual, perceptible injury. *Sedgwick on Damages*, 137; *Waterman on Trespass*, Sec. 12; *Plumley v. Dawson*, 1 Gilm. 552; *McConnel v. Kibbe*, 33 Ill. 178.

In such a case it would be no defense to prove that the land was actually benefited. *Druly v. Adams*, 102 Ill. 201; *Pfeiffer v. Grossman*, 15 Ill. 53; 1 *Waterman on Trespass*, Sec. 12.

The rule that courts will not allow new trials to recover nominal damages has no application to such cases. *Plumley v. Dawson*, 1 Gilm. 552; *Druly v. Adams*, 102 Ill. 201.

One's right of property is infringed by any unlawful flowage of his land. The omission to show actual damages, and the inference that none have been sustained, does not render the case trivial, and the maxim *de minimis non curat lex* has no application. 1 *Sutherland on Damages*, pp. 12 and 13.

The flooding of land is a direct and physical injury. *Nevins v. Peoria*, 41 Ill. 502; *Rigney v. Chicago*, 102 Ill. 72.

No authority given by charter or statute can deprive the plaintiff of his right to recover for such invasion of his property. *Rigney v. Chicago*, 102 Ill. 72.

No matter how strictly the legislative authority may have been followed, if the plaintiff's land has been overflowed an action will lie. *T. W. & W. Ry. v. Morrison*, 71 Ill. 616; *Rigney v. Chicago*, 102 Ill. 74.

If highway commissioners divert water from its natural course, whereby it is caused to flow upon the land of a private individual, without providing compensation, the tort is that of the men in their individual capacity. *Tearney v. Smith*, 86 Ill. 391; *Cooney v. Town of Hartland*, 95 Ill. 517.

The original condemnation proceedings undoubtedly include compensation for injuries which it was then shown he would suffer, but are no bar for an action for an alteration in the method of constructing a highway, or for diverting the water-course. *W., St. L. & P. Ry. v. McDougal*, 118 Ill. 229-238; *Tearney v. Smith*, 86 Ill. 395.

Proceedings under the eminent domain act are a concurrent remedy with an action at law. "The action for damages may be regarded as one kind of condemnation proceeding." Per Sheldon J. *C. E. & I. Ry. v. Loeb*, 118 Ill. 214; *O. & M. Ry. v. Wachter*, 123 Ill. 445.

The court erred in allowing parol evidence of the necessity of the ditch, and that the highway commissioners acted as an official body in determining to dig the ditches. *Chaplain v. Highway Com'rs*, 129 Ill. 651.

The court erred in allowing witnesses to swear that the land of the plaintiff had not been damaged. It was the province of the witnesses to furnish the data, and of the jury to determine therefrom the amount of damages. 1 *Sutherland on Damages*, 794; *Van Dusen v. Young*, 29 N. Y. 9; *C., etc., R. R. v. Ball*, 5 Ohio State, 568.

Mr. WILLIAM H. ALLEN, for appellees.

Where the filling up of ponds on a dominant estate would have the effect of conducting water on the dominant estate to a natural passage for surface and other water, on the dominant estate, and extending on to the servient estate, the same effect may be rightfully attained by a ditch or ditches on the

dominant estate, made to such natural passage for water, though the flow in the servient estate may be increased thereby. *Peck v. Harrington*, 109 Ill. 611; *Commissioners of Highways v. Whitsitt*, 15 Ill. App. 318.

The rule applied to farm drainage is also applied to road drainage. *Commissioners of Highways v. Whitsitt*, 15 Ill. App. 318; *Palmer v. O'Donnell*, 15 Ill. App. 324.

The owner of the superior estate has the right to drain his lands through any regular channel on his own lands, as may be required by good husbandry, which carries the water from the upper to the lower field, though the flow may be increased, so he makes no new channels on the servient estate; and may by drains or ditches drain his own land into the natural channel or water-course; and it is not necessary that such channel or water-course should have a definite channel usually flowing in a particular direction and discharging into some stream or body of water, but if it be surface water flowing in a regular channel it will be sufficient. *Commissioners of Highways v. Whitsitt*, 15 Ill. App. 322.

“Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water-course, or into any natural depression, whereby the water will be carried into some natural water-course or into some drain on the public highway, with the consent of the commissioners thereto, and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person.” *Laws of the State of Illinois, 34th General Assembly, A. D. 1885, page 79, section 4.*

“That the ditches or drains heretofore made by any county, or by any county contracting with any incorporated company, to drain the swamp and overflowed lands, donated to such county by the State, are hereby declared public ditches or drains.” *Session Laws, Ill., Thirty-third General Assembly, A. D. 1883, page 81, section 1.*

It is a well settled rule in this State that a new trial will not be granted to enable a party merely to recover vindictive or nominal damages. *Comstock v. Brosseau*, 65 Ill. 39;

McKee v. Ingalls, 4 Scam. 33; Johnson v. Weedman, 4 Scam. 497.

When the verdict is clearly right, on appeal the same will not be disturbed. Griffith v. Sutherland, 53 Ill. 195; French v. Lowry, 19 Ill. 158; Sullivan v. Dollins, 13 Ill. 85; Hill v. Ward, 2 Gilm. 285.

A court will not grant a new trial, or reverse a judgment on appeal, because of admission of improper, or the rejection of proper testimony, or for want of the proper direction or for the misdirection of the judge who tried the case, provided the court can see from the whole record that justice has been done. Greenup v. Stoker, 3 Gilm. 202; Taylor v. Danville, O. & O. R. R. Co., 10 Ill. App. 311; DeLand v. Dixon National Bank, 14 Ill. App. 219.

LACEY, J. This was an action in case commenced by appellant against appellees to recover damages for discharging water on the land of the former by means of certain drains or ditches alleged to have been dug by appellees. The declaration shows that appellees, who were commissioners of highways, but sued herein in their individual capacity, dug certain ditches on the public highway opposite and along the northeast quarter of section 20, T. 20, R. 4, and thereby discharged water upon appellant's land. To this declaration the appellees pleaded not guilty, and specially that they were commissioners of highways, and to repair the highways dug the ditches all the way in the natural course of the flow of water from the north to the south from the higher to the lower ground, to connect with the county ditch and to carry water, and the said ditches did carry water to the county ditch, which said county ditch was a public ditch, and that said ditch is in the general course of natural drainage, and only drained the said highway in the general course and direction of natural drainage, and only water that without said ditch would go there.

The cause was tried by a jury and resulted in a verdict of not guilty for appellees and the court rendered judgment for costs against the appellant. From such judgment this appeal

Crohen v. Ewers.

is taken. The situation of the respective lands was about as follows: The appellant owned the forty-acre tract of land mentioned in the declaration. One Florence owned another forty-acre tract just north, and Mr. Ewers, one of the appellees, owned 120 acres just east of appellant's and Florence's tracts, in an L shape, the long way being opposite the tract of appellants.

The public highway runs from the north to the south, on the east line of Florence's and appellant's land, and on the west line of appellee Ewers', extending south. It was the appellees' acts in improving this road that are complained of, that is, in digging certain ditches along the margin of the thrown up road on either side, and thereby conducting water from the north from appellee Ewers' land that it is claimed would not otherwise come onto appellant's land. It appears from the evidence that the general levels of the respective tracts of land were that both Ewers' and Florence's land were higher than that of appellant, and water in a state of nature flowed from Ewers' land on the east and from Florence's land on the north over and across appellant's land in a southwesterly direction, making its way toward Meredoced creek, some five or six miles distant to the west. The land of appellant Florence and Ewers was flat and was located in the course of the general flow of water from the north and east and full of little depressions or sloughs, mostly extending easterly and westerly. Sometimes when Rock creek, which is about one and one-half miles east, overflowed its banks, water flowed nearly all over these lands from the east to the west. In fact, the land of appellant was the servient estate as to the water flowing from Florence's and Ewers' lands, and the latter the dominant or superior estates. The ground through which the road ran through these lands was flat and wet so that the road had to be thrown up and bridges for the passage-way of water opposite the various sloughs put in.

There was an old county ditch crossing the road extending across Ewers' land, extending from east to west across appellant's land and running on eastwardly to the Meredoced creek spoken of, and crossing appellant's land on his east line

about midway, and coming out on his west line not far from the southwest corner. Opposite this ditch on the road, the highway commissioners had built a bridge twenty feet wide for the passage of water into the ditch. Just north of this about ten rods, appellees, as highway commissioners, constructed another bridge about ten feet wide; this was opposite the slough or depression extending from Ewers' land across the highway and onto and across appellant's land where water was wont to flow from Ewers' land onto and across appellant's land and into the county ditch near the southwest corner thereof. Just north of this bridge there was another highway bridge across, a little north of appellant's land, to bridge another slough extending from appellee Ewers' land to and across Florence's land, where the water gathered and flowed from east to west from Ewers' land onto and across Florence's land and entering appellant's land on his north line about sixty-eight rods west from the road and then running southwesterly to his southwest corner into the old county ditch and thence off. The three sloughs, the one opposite the county ditch bridge, the one at the first bridge north of it and the one at the Florence bridge, so called, had a more or less imperfect connection east on the lands of Ewers, in which the water ran from the northmost one to the southernmost one and then into the county ditch. This connection probably did not perfectly drain the two northern sloughs to the south. There were on the line of the road between these sloughs, little swells of land of some fourteen inches or so at the highest point, that prevented the water running from the one to the other from the north to the south.

For some years prior to the time of the work complained of, the road along the course of these lands had been graded up by throwing the dirt from the margin of the road on either side, making a bank in the center of the road for travel and a ditch on either side for water, except certain benches across the ditch which were not taken out; probably two of them on either side below Florence's land and above the second bridge, and some portions of the ditch between the second bridge and

the county ditch, were also not taken out. In improving the road the appellees built the second bridge and dug a passage way for water under it, as a great preponderance of the evidence shows, about even with the original surface of the ground, and also took out the benches in the ditch and cleaned out and deepened the ditches from the second bridge to the county ditch, so that the water could have a freer passage. Now, the cleaning out of the ditches and removing the benches of earth in them, are the acts that are complained of as illegal and from which the damages for which suit is brought resulted, as is alleged. The putting in the bridge and the digging of the passage way under it was certainly in itself not wrongful, as at that point there was a regular depression through which water was accustomed to pass from the east to the west on appellant's land. It appears also that appellant himself, when he was one of the commissioners of highways, excavated these ditches from the Florence bridge south to a point below his line, but, as he claims, left benches to hold back the water. Now, the commissioners of highways, the appellees, found that these ditches were conducting the water down and overflowing the road bed, and in order to improve the highway, they cleaned out the ditches all the way down to the county ditch, so the water could pass out through such ditch. This we think they had a right unquestionably to do, if in so doing they did not injure appellant's land, or if they conducted such water into the county ditch or into some outlet or depression on appellant's land over which the water from the appellee Ewers' estate had a right to pass. It does not appear from the evidence very satisfactorily, how much of a slough or depression existed on and over appellant's land southwesterly to the county ditch from the point where the second bridge was built, but it shows that on appellee Ewers' land opposite, there was a well-marked slough and depression, out of which much water flowed at times in a state of nature and emptied out at that point on appellant's land, and that it found its way across his land very readily to the county ditch.

There was at times such a flow that it even washed away

the road embankment at that point, and there was at that point across appellant's land a fall from there to the county ditch of over four feet to the mile. We are inclined to think that the evidence was sufficient to sustain the claim that this was a natural depression into which appellee Ewers, in his own right as well as in his capacity as commissioner of highways, might conduct the water from the superior to the servient estate, even if the flow of the water in such depression was thereby increased; and he might also conduct it into the county ditch. But the evidence, as we think, more than warranted the jury in finding by their verdict that the flow was not enough, if any, increased to be of any damage to appellant. In furtherance of good husbandry, and the public benefits to the public from the improvements of the highways, the law compels the owner of the servient estate to suffer all such inappreciable damages as these. Neither the appellees nor the public will acquire a new easement for the flow of water over the appellant's land by the construction and maintenance of the ditches in the present form. The appellee Ewers and the public had that before; and as the flow of water over his land has not been increased so as to damage him in any degree, he has no cause of action. The rule of law laid down in *Peck v. Harrington*, 109 Ill. 611, *Converse v. Whitsitt*, 15 Ill. App. 318, and *Palmer v. O'Donnell*, 15 Ill. App. 324, we think is applicable here and will govern in this case.

It was not error to allow witnesses to testify that in their opinion the opening of the ditches along the highway caused appellant no damages. The question of damages and the amount thereof, if any, was a matter about which men acquainted with such matters could give their opinion. If the appellant wanted to inquire into the basis of that opinion he could do so by cross-examination. The appellees' instructions to the effect that unless the jury believe from the evidence that appellant was damaged by the wrongful acts of appellees he could not recover, were not erroneous. There was no pretense that if the water went over the appellant's land in increased quantities, but that appellant was damaged, and if the appellees' acts were illegal and tortious, that the former should recover.

 Burlington Insurance Co. v. Brockway.

The jury was fully instructed on this point on appellant's motion, and if he was simply suing to recover nominal damages and he had desired to have the law laid down more clearly on the point for such recovery, he should have asked instructions directed to that question particularly. We think substantial justice has been done and that the verdict was in accordance with the evidence.

Appellees have made out an amended abstract in the case, and move the court to rule that appellant pay to the appellees the cost of such abstract. We are of the opinion that appellant's abstract was not fair to appellees and did not contain the substance of all their evidence in many material points. The judgment of the court below is therefore affirmed and the appellant ordered to pay to appellees the costs of the additional abstract.

Judgment affirmed.

 BURLINGTON INSURANCE COMPANY

V.

F. F. BROCKWAY.

Fire Insurance—Policy—Interpretation of Forfeiture Clause—Vacancy.

In an action upon an insurance policy upon a building "while occupied by assured as a country store and dwelling," which policy contained a clause providing for a forfeiture in case the building became vacant and unoccupied for more than ten days without notice to the company, etc., it is *held*: That the forfeiture did not attach when the building ceased to be occupied as a dwelling, but only in case it was not occupied at all.

[Opinion filed December 8, 1890.]

APPEAL from the Circuit Court of Stark County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. M. SHALLENBERGER and T. G. HARPER, for appellant.

Messrs. C. C. WILSON, FRANK THOMAS and B. F. THOMPSON, for appellee.

C. B. SMITH, P. J. This was an action in assumpsit brought by appellee against appellant on two policies of insurance, numbered respectively 12,199 and 12,200, issued to appellee on his building occupied as a store and residence, where the insurance was effected, and also upon his stock of goods in said building. After the insurance was taken out the building and goods took fire and were destroyed, and this suit was brought to recover the value of property so destroyed. On the trial the appellee received a judgment for \$3,689.90. From that judgment this appeal is prosecuted and various errors assigned upon the record. Both policies were taken out and dated March 14, 1888. When the policies were taken out appellee occupied the upper part of the store with his family, and used it for his residence. About the 5th of November, 1888, appellee moved his family out of the store and moved to Galesburg, leaving his son in the store in charge of the goods and to carry on the business. On the 27th of November, 1888, the store took fire, and both store and goods were consumed.

Policy No. 12,199 provided among other things as follows: "\$1,500 on the two-story shingle roof frame building while occupied by assured as a country store and dwelling." And as to the stock of goods it provided as follows: "\$2,000 on the stock of dry goods, while contained in the above described building, occupied as a country store and dwelling."

Policy No. 12,200 provides for insurance of "\$1,000 on the two-story shingle roof, frame building while occupied by assured as a country store, warehouse, dwelling or hall." Both policies seem to be alike in all other respects. Among the various clauses in these policies providing for forfeiture under them by the assured, is the following: "Or if the premises hereby insured are, or shall hereafter become vacant or unoccupied, for more than ten days without notice to the company in each case, and consent indorsed herein, then this policy to be void." Another cause of forfeiture was that if the assured should refuse to submit to an examination under oath, concerning matters pertinent to the insurance and loss, then he should forfeit all rights under it.

The defendant pleaded the general issue and six special pleas, as follows:

Burlington Insurance Co. v. Brockway.

1. That the assured made false statements in his application.

2. That the assured, by his own negligence, caused his loss in the use of a kerosene lamp.

3. That the premises were not occupied as a dwelling at the time of the loss.

4. That the assured refused to submit to an examination under oath, touching his loss.

Issues were joined on those various pleas.

The proof showed that the building caught fire shortly after the store was closed, on the night of the 27th of November, 1888, and was quickly consumed. There is no proof that the assured or his son, who was then in charge of the store, was guilty of any negligence or wrong-doing, in connection with the fire.

Appellant makes its principal, if not entire, defense here, under its 3d and 4th pleas.

The 4th, and all other special pleas, involved only questions of fact, and the issues joined upon them were for the jury to try, and we see no reason for interfering with their finding upon these questions of fact involved. There is a direct conflict between the agent of appellant and appellee, upon the question as to whether appellee refused to submit to an examination under oath, as required by the terms of the policy. The jury believed appellee, and we can not say they were not justified in doing so. While the 3d plea presents a question of fact, it still remains for the court to construe the terms of the policy under the admitted fact that the building was not occupied as a dwelling house by the assured, at the time of the fire. The clause providing for a forfeiture of all, or any right under these policies on account of non-occupation of the building, does not provide for a forfeiture for a failure to occupy it as a dwelling, but for a failure to occupy it at all for any purpose without notice to the company. The company having itself selected and stated the grounds upon which the assured shall lose all benefit of assurance, and the assured having accepted the policy with such provision, the presumption will be indulged that that was the

only ground of forfeiture upon which the company intended to rely for a failure to occupy the building as stated in the contracting clause of the policy; and the company will not now be permitted to interpolate an additional ground of forfeiture by construction. In order to enable the company to have the benefit of the forfeiture specified, the proof must bring it within the very letter and terms of the forfeiting clause, and show a total abandonment or non-occupying of the building, which it entirely fails to do. The law abhors forfeitures, and will show them no mercy nor favor. These contracts of insurance are wholly prepared by the companies. They dictate and name all the terms, conditions and forfeitures of their contracts. Not even their own agents are permitted to negotiate the terms of insurance or conditions of the contracts of insurance, or in any manner to change the printed forms. The assured is a passive and helpless party in their hands, having absolutely nothing to do but accept such printed terms as the company sees fit to impose, or let his property go without insurance. There is, therefore, great justice and propriety in construing these one-sided contracts most strongly against him who prepares them in his own interest and for his own gain, and many times in terms so subtle and wary as not to be understood, and well nigh impossible to be kept and observed, on the part of the assured. These are the very maxims of the law, and are so consistent with justice and the uniform ruling of the courts everywhere, that they need no citations of authority in their support. If it be conceded that the statement in the policies concerning the character of the occupancy of the premises is to be taken as a warranty of the truth of that statement and that the warranty has failed, and that it is not a mere description of the premises, still the parties have provided but one penalty for such breach of the warranty, viz.: the one of forfeiture of all right under the policy, in case of entire non-occupation of the premises.

After a careful examination of this record, and of the various objections urged for a reversal, we have been unable to find any error, and the judgment will therefore be affirmed.

Judgment affirmed.

Brotherhood of Railroad Brakemen v. Knowles.

THE BROTHERHOOD OF RAILROAD BRAKEMEN

V.

SUSANNAH KNOWLES ET AL.

Life Insurance—Policy—Conditions—Breach—Alleged Non-payment of Dues.

In an action on a policy of insurance where the defense was that the dues of deceased had not been received by defendant, it is *held*: That the evidence conclusively showed that the deceased had paid his dues to the proper officer of his local lodge, and that the defense was wholly without merit.

[Opinion filed December 11, 1890.]

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. M. J. DOUGHERTY, for appellant.

Messrs. WILLIAMS, LAWRENCE & BANCROFT, for appellees.

Per Curiam. This suit is brought by appellee and Eli C. Knowles, upon an insurance policy issued to J. W. Miller by the appellants, on the 23d day of December, 1885. The policy was as follows:

“GALESBURG, Ill., Dec. 23d, 1885.

This Policy of Assurance witnesseth:

That the Brotherhood of Railroad Brakemen of the Western Hemisphere, in consideration of the grand dues to them duly paid in accordance with the provisions of the constitution of said brotherhood by J. W. Miller, and of the annual payment of such grand dues every year during the continuance of this policy, do assure the life of said member, J. W. Miller.

And the said brotherhood do hereby promise and agree to pay the amount of insurance that may at the time of the death of said assured be justly due and owing, according to the provisions of said constitution, as well as the like sum in

case of disability of said assured, in accordance with the terms and conditions further provided in said constitution. The said sum or sums to be paid as stipulated therein to and for the sole use of such person or persons to whom this policy shall be made assignable by said assured, and if such person or persons shall, at the death of such assured, be not living, then to the nearest heir or heirs, on receiving proof of the death of said assured, and the identity and proof of right in claimant to inherit the same according to the requirements of said constitution, any indebtedness to the brotherhood on account of this policy being first deducted therefrom.

In every case when this policy shall cease and terminate, or be null and void, by reason of immoral or other misconduct, and the assured shall forfeit his membership in the lodge, according to the provisions of the constitution of this brotherhood, then all payments thereon shall be forfeited to the brotherhood and the policy is canceled."

J. W. Miller died on the 28th day of July, 1886. Between the time he became a member and the time of his death something like eight or nine assessments had been made upon him and other members to meet the losses for which the company was liable. The proof is clear and uncontradicted that Miller paid all his assessments and dues required by the constitution and by-laws, as they became due, some of them before they became due, to the officer authorized to deliver them, in the subordinate lodge to which he belonged, and took the receipt of such officer or his deputy for the same, under the seal of the corporation. It appears, however, that the treasurer of the subordinate lodge neglected to report and pay over these assessments, with others which he had collected, to the Grand Lodge, as his duty required him to do. As a further evidence of Miller having paid all his dues and assessments, his own subordinate lodge had issued to him a "traveling card," which under the by-laws could not be issued to any member not in good standing and who was in arrears of dues or assessments.

This record shows clearly that Miller did his whole duty and kept his membership good up to the time of his death.

Brotherhood of Railroad Brakemen v. Knowles.

Upon his death the proper proof of death was made and payment demanded of the sum of \$600 due on the policy, but payment was refused by the Grand Lodge through which the payment had to be made, because the Grand Lodge had not received the money which Miller paid in, and that is the defense here relied on. The plaintiffs had judgment below for the amount due on the policy, and the appellant appeals from that judgment and assigns numerous errors, none of which we regard as having any merit.

Miller paid his money to the proper officer, and the failure of that officer to report it to his superior is no concern of the insured. But the proof in fact shows that the local lodge to which Miller belonged and to which he paid his money made up the default of their treasurer for a number of its members, who had paid as Miller had, and sent every dollar that was due to the Grand Lodge, after Miller's death, so that the Grand Lodge did, in fact, get the money due it, and has kept and now has it; and so far as we can see the Grand Lodge now has in its treasury the very money that was collected to pay the loss resulting from Miller's death. It is contended by appellant that the receipts given to Miller upon his payments are fraudulent, and that he in fact paid nothing. This charge has not a particle of evidence in its support and is utterly frivolous. Complaint is also made that the court erred in giving and refusing instructions and in admitting and refusing evidence. We have carefully examined the instructions, and the proceedings before the court on the trial, and we find no substantial error of any kind committed against appellant. The instructions given for it were all that it had any right to ask. The refused instructions submitted to the jury questions about which there was no controversy whatever, and were properly refused. We think the entire defense was without the shadow of merit of any kind, and the judgment and proceedings of the Circuit Court were in all respects regular and right, and the judgment will therefore be affirmed.

Judgment affirmed.

C. C. BLAIN
v.
E. DESROSIERES.

Partnerships—Bill of Particulars—Evidence.

In an action of assumpsit brought to recover money alleged to have been loaned, where the defense claimed that the matters in controversy were part of a partnership transaction, it is *held*: That the issues were properly submitted to a jury and that the evidence sustained the verdict for the plaintiff.

[Opinion filed December 11, 1890.]

APPEAL from the Circuit Court of Kankakee County; the Hon. N. J. PILSBURY, Judge, presiding.

Mr. H. K. WHEELER, for appellant.

Messrs. RICHARDSON BROS., for appellee.

UPTON, J. This suit was commenced in the Circuit Court of Kankakee County by the appellee against the appellant. The action was assumpsit. The declaration contained the common counts only. The defense set up was, that the cause of action in the suit arose from money paid and service rendered by appellee to and for a copartnership theretofore doing business as Blain & Desrosiers, of which appellee and appellant were members, the business of which is still unsettled and could only be the subject of investigation in a court of equity. A bill of particulars was filed with the declaration, in which appellee claimed \$641, which was subsequently amended by the further claim of \$200 for money loaned to appellant, with interest at six per cent, being \$36, and the further sum of \$5, claimed to have been loaned to appellant's wife, aggregating \$241.

The cause was heard in the court below with a jury, who found a verdict for the appellee in the sum of \$240, upon

which the court, after overruling a motion for a new trial, rendered judgment, to which appellant excepted and appealed to this court. The error assigned upon the record challenges the rulings of the trial court in allowing appellee to introduce evidence of the \$200, money claimed to have been loaned to appellant, because it was not on the bill of particulars, and committed further error in permitting appellee to introduce in evidence the memoranda or book of accounts of appellee, tending to show the receipt by appellant of the \$200; also erred in not dismissing the suit, because the claim sued upon was a co-partnership account, and that the verdict of the jury is not supported by the evidence or the law of the case, and a new trial should have been awarded appellant on his motion therefor. No complaint is made of the action of the trial court in other particulars. The appellant in his evidence admits that he received of appellee the \$200, claimed in appellee's bill of particulars; that the entries upon the book or memorandum of appellee which was introduced in evidence, of \$125 and \$75, were written therein by himself. Both appellee and appellant testify to that fact, and these two items constituted the \$200 then claimed by the appellee. Appellee also presented a due bill signed by appellant for \$40, made payable to appellee. Appellant admits giving the due bill, but claimed that he paid the same to appellee and neglected to take it up. To this extent it is plain, with our reference to the book of appellee or his memorandum, which the court admitted in evidence (and which is one of the principal errors complained of), that the appellant had received moneys of the appellee to the extent of \$240, and for which he should in some way account with appellee. This he attempted to do (under his plea) by testifying that he received the \$200 as a portion of the capital stock paid to him by appellee as copartner in the firm of Blain & Desrosiers, which was flatly denied by the appellee.

The due bill for the \$40 produced by appellee was also claimed to have been paid as before stated, and this was flatly denied by appellee. These questions thus sharply defined must have been fully understood by the jury. The one assert-

ing a given state of facts, which, if believed, would compel a verdict in favor of appellant—the denial of the other, which, if credited, must result in a judgment for appellee; the parties were both before the jury in person, and testified in the case. The jury believed the appellee in that contention, and consequently gave him a verdict for his claim to the extent indicated, as before stated, and we can not say they were not fully warranted in so finding. It by no means follows that the jury in their determination disregarded a portion of the evidence in the case, by not taking into account the other items in the bill of particulars as claimed by the appellee. They might well have found from the evidence that the copartnership as claimed by appellant did in fact exist, and that in fact the other items on the bill of particulars claimed by appellee were matters pertaining thereto, and were not under the instructions of the court for adjudication in this suit, and that, too, without in the least impairing the credibility of the appellee. It is manifest from the record before us, that appellee is not possessed of large business experience or extensive knowledge of business affairs, and from his surroundings would not be expected to be versed in law to such an extent as to enable him to know what acts would constitute him a copartner of appellant, while appellant, it would seem, was by far his superior in that regard.

It is plain the court did not err in submitting the question of the copartnership alleged to exist, to the jury. It would have been manifest error to have done otherwise as there was a conflict of evidence upon that issue.

We have carefully examined the record before us in the light of the errors pointed out and the arguments of counsel made, and we fail to find any reversible error herein, and the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

Chase v. Nelson.

MAURICE J. CHASE

V.

JOHN NELSON, ADMINISTRATOR.

Negligence—Action to Recover Damages for Death Alleged to Have Been Caused by Malpractice—Instructions—Construction of Statute—Burden of Proof.

1. In an action to recover for death alleged to have been caused by the malpractice of the defendant, a physician, an instruction which authorized a recovery by the plaintiff, in case the jury found that the negligence of defendant *contributed* to the death of plaintiff's intestate, was erroneous. Under the statute of this State, to justify a recovery in such case, the negligence of defendant must have been the direct cause of death.

2. Under the pleadings and evidence in this case the burden of proof was on the plaintiff all the way through, and an instruction that in a certain contingency the burden might be shifted to the defendant was error.

3. It is the duty of a trial court to see that all of its instructions are correct and harmonious, and not to trust to good ones to cure bad ones.

[Opinion filed December 11, 1890.]

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. J. J. & G. TUNNICLIFF and J. A. MCKENZIE, for appellant.

Messrs. FORREST F. COOKE and A. M. BROWN, for appellee.

C. B. SMITH, P. J. This was an action on the case brought by appellee, administrator of the estate of B. J. Nelson, against appellant, Chase, to recover damages for alleged malpractice by appellant in treating B. J. Nelson in such negligent and unskillful manner, that B. J. Nelson died as the result of such unskillful treatment.

The case was tried upon the following amended count in the declaration, viz.:

“And whereas, the defendant, before and at the time of the committing of the grievances hereinafter mentioned, was

exercising the profession of a physician, and the said Bror Nelson, deceased, while the defendant was so exercising such profession, there retained and employed the defendant as such physician for reward, to attend to and treat him for the cure of a certain sickness under which he was then and there suffering. And thereupon the defendant as such physician, accepted such retainer and employment and entered upon the treatment of the said Bror Nelson in pursuance thereof, and continued to treat the said Nelson a long space of time, to wit, thirty days next following. And the plaintiff avers that the disease with which the said Nelson was suffering, and for which the defendant was called to treat, and which the defendant undertook to cure, required, as stated to said Nelson, that his urine should be drawn away by mechanical means, the said Nelson at that time being unable to pass his urine in the ordinary manner, and this being his sole and only trouble, for which the defendant was called to treat, and the plaintiff avers that the defendant in his attempt to cure the said Nelson of said trouble, introduced into the urethra of the said Nelson, and so on into the opening of his bladder, one hollow tube called a catheter, for the purpose of drawing away the urine so detained in the bladder of the said Nelson. And the plaintiff avers that the defendant while performing the said operation, either because of the defective character of the catheter used, or on account of the unskillful manner of its use by the said defendant, broke said catheter within the urethra of the said Nelson, so that when said catheter was attempted to be withdrawn from the urethra of the said Nelson, a large portion of said rubber tube and catheter was left within the urethra; and the plaintiff avers that on account of the danger incident to the presence of any foreign substance within the passages of the body, and its great liability to produce inflammation of the parts and so result fatally, it became and was the duty of the defendant to have immediately removed said broken piece of catheter from the urethra of said Nelson, and so saved the said Nelson from the sufferings and complications of diseases which followed. But the

Chase v. Nelson.

defendant, wholly unmindful of his duty in the premises, refused and neglected to remove said broken catheter; indeed, claimed that it was unnecessary; that it would dissolve shortly and come away without trouble to or danger to the said Nelson, and so the defendant, although the said catheter, by the exercise of ordinary skill and care, could have been easily taken away, allowed the same to remain in the urethra, where it was a source of constant annoyance and pain to the said Nelson, until finally said broken catheter worked itself through and into the bladder, where it was allowed to remain by the defendant, until inflammation and thickening of the bladder took place, and so great was the disease of the bladder, caused wholly by the presence of said catheter within the bladder, on account of the defendant's neglect and want of ordinary care and skill in not removing the same, that he, the said Bror Nelson, on the 11th of September, died; and the plaintiff avers that the death of the said Bror Nelson was caused by reason of the unskillful conduct of the defendant aforesaid; and the plaintiff avers that the said Bror Nelson left surviving him one Charlotte Nelson, his widow, and minor children, his next of kin, who are still living, and by reason of the death of said Nelson, said widow is deprived of her means of support, and said children of their means of support and education, to the damage of the plaintiff, as administrator, of \$5,000, and therefore he brings suit. And the plaintiff brings into court his 'letter of administration, granted by the County Court of the county aforesaid.

COOKE & BROWN, Attorneys."

Plea of not guilty by defendant filed November 23, 1889. A trial was had at the March term, 1890, before a jury, resulting in a verdict for the plaintiff for \$2,250. The court overruled a motion for a new trial and gave judgment on the verdict. Appellant now brings the record here on appeal and assigns numerous errors on the record. The chief errors relied upon however are, that the verdict is against the evidence, and that the court erred in giving instructions for the plaintiff, and refusing instructions for the defendant. In the

view we take of the case it will only be necessary for us to consider the assignment of errors, relating to the instructions. Inasmuch as the judgment must be reversed for erroneous instructions, we shall express no opinion as to the weight or value of the evidence on either side, except to say that the statements in the plaintiff's declaration as to the nature of B. J. Nelson's affection, and as to the use made of the catheter, and the fact of its having been broken off in the body of said Nelson, as alleged, while in the hands of appellant, seem to be supported by the evidence, and, as we understand the proof, upon these averments in the declaration there is no substantial controversy, except that the defendant insists that Nelson was laboring under other serious and dangerous maladies at the time he was called, besides the retention of his urine.

The only real controversy was as to whether appellant used reasonable and ordinary skill as a physician and surgeon in the care and use of his catheter, and in leaving the broken catheter in the urethra of B. J. Nelson, after it was broken off. Upon these controverted points there was a great deal of testimony taken on both sides, upon the weight of which we express no opinion. It is sufficient for our purpose to say that the evidence submitted tended to prove the respective theories of both plaintiff and defendant, and therefore called for correct and accurate instructions from the court.

The first instruction given for the plaintiff contained among other things this clause, viz.:

"If, therefore, the jury believe from the evidence in this case that the defendant undertook the treatment of B. J. Nelson for a fee, and that in treating him a catheter was broken in his urethra, and by reason of the want of the exercise of ordinary care and skill the broken part of said catheter was allowed to remain in the urethra and finally to pass into the bladder of B. J. Nelson, and that disease was thereby created that caused or contributed to the death of B. J. Nelson, then your verdict must be for the plaintiff in such an amount as you believe the plaintiff has from all the evidence sustained, not exceeding \$5,000."

This part of the instruction was erroneous and should have

Chase v. Nelson.

been stricken out, or the whole of it refused. This action is based upon the statute, Chap. 70, Sec. 1, and but for the statute could not be maintained. Under the common law no such right of action existed. The statute being in derogation of the common law should have a reasonably strict construction. Its benefits should not be extended to causes not fairly within its language or fairly inferable from its language. *Thompson v. Weller*, 85 Ill. 197. The statute under which this action is commenced provides that "whenever the death of a person is *caused* by the wrongful act, neglect or default of another," then such person who so *caused* the death shall be liable, etc. Now, the plain and manifest meaning of this statute is that "the wrongful act, neglect, or default" must be the direct cause of the death, and must also be such an act as would likely produce death, and death thereby be the consequence, sooner or later, of the wrongful act. The instruction under consideration informed the jury that if the negligence of appellant, Chase, caused or *contributed* to the death of Nelson, then they must find the defendant guilty. Under this instruction, no matter how remotely the negligent act of defendant may have contributed to hasten the death of Nelson, still he would be liable notwithstanding; the jury may have been satisfied that the disease under which Nelson was suffering when defendant was called to treat him, would or must result fatally to him. This instruction interpolated a very important word in the statute, which the Legislature did not see fit to put in it. For that reason this first instruction was wrong.

The third instruction given for the plaintiff is as follows:

"3. The court instructs the jury, that if at the time Dr. Wilson entered upon the treatment of B. J. Nelson on the 7th day of September, 1888, that he, Nelson, was suffering from inflammation of the urethra, bladder and prostate gland, together with other diseases, and that such troubles were caused by the lack of the exercise of ordinary care and skill on the part of the defendant, and that his condition was such that death must take place in a short time unless medical relief was given him, then it is incumbent upon the defend-

ant to show by a preponderance of the evidence that the death of B. J. Nelson resulted from other causes that were not the result of any conditions present at the time defendant ceased to treat him, and Dr. Wilson assumed charge of the case."

This instruction is open to two objections at least. The first one is that it is obscure and blind in its meaning and liable to be misunderstood and mislead the jury. The proof is that when appellant was called to treat Nelson in the first instance, he at least had retention of the urine, which of itself was a very serious and dangerous disease. The evidence also tends to show that he was afflicted with other disorders, such as hernia and great enlargement of the prostate gland. The evidence on the part of the defendant tended strongly to prove that Nelson's health was in a very precarious condition if he was not in danger of an early demise. He was sixty years old. These disorders were upon him when appellant was called to treat him, and in his attempt to relieve him from the suffering caused by the retention of the urine, the catheter was broken in the urethra. It is clear to us that while it is possible that the breaking off of the catheter aggravated the sufferings of Nelson and may have hastened his death, still the proof is that Chase was not the author of his enlarged prostate gland nor of his hernia, nor of the retention of his urine. Yet the jury are told in this instruction that "the burden of proof is on appellant to show that the death of Nelson resulted from other causes that were not the result of any conditions present at the time the defendant came to treat him."

This instruction is clearly wrong. The burden was on the plaintiff, at every stage of the case, to show that Nelson's death was caused by the negligence of appellant. Appellant set up no affirmative, independent defense that cast the burden on him. He simply pleaded not guilty, and in his defense he showed the general condition of the health of Nelson and the various maladies with which he was suffering, and the manner of his treatment by himself, and others who followed him, as a part of the whole transaction. He had a right in his defense to show that even if his act was a negligent one, that

Chase v. Nelson.

still the nature of Nelson's afflictions were of such a character that he would have died soon at all events; and although such showing might not constitute a complete bar to the action, it was still important in mitigation of damages. He had the right to show in bar of the action under the general issue that the operation performed upon Nelson by Dr. Wilson and others caused his death; but when he attempted to show this, he did not assume the burden of the proof upon that or any other question in the case. The burden was all the time on the appellee at all stages of the case. Under the evidence and theory upon which the case was tried, we see no place where the burden of the evidence would shift upon the defense, and the giving of that instruction was therefore erroneous. The fourth instruction for appellee is argumentative, and calls particular attention to some particular facts, to the exclusion of others equally important, and should not have been given.

The defendant asked the court to give the jury the following instruction:

9. "The jury must remember that the burden of proof is on the plaintiff to maintain all the material facts necessary to make out his case by a preponderance of the evidence. The presumptions of the law in absence of evidence to the contrary are that the defendant is not guilty, and unless by a preponderance of the testimony the jury are made to believe that the defendant is guilty as charged, then the verdict of the jury will be *not guilty*."

But the court refused it because it was a duplicate of another given. We do not find any other instruction given for appellant that can be fairly claimed to be a duplicate of this one; and, inasmuch as it is a clear and correct statement of the law applicable to the case, it should have been given.

Counsel for appellee contend, when all the instructions on both sides are taken together, that the jury could not have been misled.

We think it very unsafe practice to expect juries to pick out and act on good instructions and reject erroneous ones, or even to expect the jury to harmonize a large mass of con-

flicting and adroitly drawn instructions. They are as likely to follow bad as good instructions. It is the bounden duty of the court to see that all its instructions are correct and harmonious, and not to trust to good ones to cure bad ones. *Quinn v. Donovan*, 85 Ill. 194; *Dempsey v. Bowen*, 25 Ill. App. 193. Every instruction should be a direct, short and clear statement of the law, and should be free from uncertainty and doubtful meaning.

For the errors above indicated the judgment will be reversed and remanded.

Reversed and remanded.

WILLIAM WILMERTON

V.

SAMUEL SAMPLE.

Malicious Prosecution—Instructions—Erroneous Assumptions in—Prolixity and Argumentative Character of—Evidence—Introduction of Record to Show Plaintiff's Acquittal.

1. Although instructions contain correct propositions of law, yet where such propositions are repeated so often and in so many different forms by the court as to assume the character of an argument from the court, such instructions are open to serious criticism.

2. In an action for malicious prosecution, where the plaintiff had been arrested for malicious mischief, an instruction that a person who is in possession of property, claiming to be the owner of it, can not be guilty of malicious mischief in destroying the same, nor of larceny in regard to the same, is erroneous in that it ignores the question whether the claim of ownership is made in good faith.

3. Instructions in the case at bar *held* to have been erroneous, in that they assumed the existence of material facts which were in dispute and were based upon hypotheses which were unsupported by any evidence.

4. Whether it was error to admit in evidence the record of the trial and acquittal of plaintiff on the indictment for malicious mischief, *quære*.

[Opinion filed December 11, 1890.]

39	60
42	255
39	60
81	209

Wilmerton v. Sample.

APPEAL from the Circuit Court of Mercer County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. J. H. CONNELL and J. M. BROCK, for appellant.

Messrs. BASSETT & BASSETT, for appellee.

C. B. SMITH, P. J. This was an action on the case. The declaration contains seven counts. The first charges appellant with assaulting and beating appellee. The second with assaulting appellee, and taking him before a justice and imprisoning him without probable cause. The third with committing a trespass upon appellee's house and destroying doors and windows. The fourth with trespassing on the land of appellee and destroying grass, corn, etc.; and the fifth with destroying appellee's trees. We do not understand that any serious effort is made to sustain this judgment under any of the first five counts, and even if there were any such claim it is clear there is no sufficient evidence in the record to justify such claim. The sixth charges that appellant went before a justice and falsely and maliciously procured the arrest and imprisonment of appellee without probable cause, and the seventh that appellant falsely and maliciously and without probable cause went before the grand jury and procured an indictment against appellee for malicious mischief.

The general issue was filed and upon a trial the plaintiff obtained a verdict for \$181, and after overruling a motion for a new trial the court gave judgment upon the verdict. The record is now brought here by appellant, who insists that the verdict is against the evidence and that the court erred in giving and refusing instructions and in receiving and rejecting evidence to the prejudice of appellant.

The record in this case shows that this controversy is the final result and culmination of a long effort on the part of appellee to get the title to certain land of which appellant claimed to be the owner, through judicial proceedings. Appellant was claiming the title, and the right to possession at least, of one forty-acre tract upon which a house stood.

This house had been occupied by a tenant of appellee. Appellant had given this tenant notice to quit and surrender possession to him. The tenant left and before appellant took actual possession of the land appellee went and practically destroyed the house and so mutilated it that it was not and could not be occupied. He chopped down some of the doors and windows. Mutilated the plastering, tore off the casings to the doors and windows, tore off the weather boarding and carried the doors of the house home with him and concealed them in a dark cellar. He also chopped down a number of fruit trees, grape vines, etc., about the house. For the injury to the house and orchard appellant had him arrested for malicious mischief, and for carrying away the doors and concealing them, appellant had him arrested for larceny. On a trial for malicious mischief appellee was acquitted and the prosecutors *nollied* the indictment charging appellee with larceny.

On the trial of this cause the evidence was somewhat conflicting upon the material questions involved, but as to the weight or value of it we express no opinion, inasmuch as the case must be remanded for another trial. The real and substantial question arose on the 6th and 7th counts, charging appellant with malicious prosecution and false imprisonment without probable cause. To justify a recovery under these counts the proof must show both malice and want of probable cause. Whether either of these necessary elements existed in this case was hotly contested on both sides, and it was earnestly denied by appellant. It was therefore important that the law should have been accurately declared to the jury. This we think was not done in several of the instructions. Twenty-two long and elaborate instructions were given for the plaintiff, and so far as we can see or are advised by the record, exactly as submitted by counsel for appellee. Without stopping to criticise all this mass of miscalled instructions, we think that it must have impressed the jury more like an argument from the court in behalf of the plaintiff, than a simple, short and direct statement of the law as applicable to the facts in evidence. Many of these contain cor-

Wilmerton v. Sample.

rect statements of the law, to which, standing single or in company with a reasonable number, no objection could be taken; but when correct propositions of law are repeated so often and in so many different ways by the court as to bear and assume the character of an argument from the court, then they are open to serious criticism and are obnoxious to any correct practice in instructing a jury. But aside from this objection going to the number, repetition and argumentative character of the instructions given for plaintiff as a whole, several of them were erroneous.

The 13th was as follows:

“If the jury believe from the evidence in this case that the defendant knew, or had good reason to know, that the plaintiff was in possession of the real estate and personal property which it was charged he maliciously injured, claiming to own the same at the time the criminal charge was alleged to have been committed, then there was no probable cause for the prosecution.”

This instruction is open to two objections. The jury are told that if the plaintiff was in possession of the property, claiming it, then there was no probable cause for the prosecution without reference to the fact whether appellee was claiming in good or bad faith. The mere possession and claim of ownership in property is not of itself conclusive of his right to it as against a better or rightful owner, nor as against such better title, authorizes him to destroy it. Such possession and claim of ownership must be made in good faith and in an honest and reasonable belief that it is his own property and that he has a right to injure or destroy it. After announcing this erroneous principle of law the court then declares, as a matter of fact, that if such claim was made then there was no probable cause for such arrest. Whether the facts all considered or any of them furnished ground for believing there was probable cause for the arrest, was for the jury and not the court. This instruction was highly prejudicial to the defendant, and well nigh took the case from the jury. There was no denial that the plaintiff in that case was in possession and claiming some kind of right at the time of the injury to the house and taking away the doors, but whether

he had any reasonable ground for making such claim, and whether, in the light of the undisputed facts, such claim was an honest one, ought to have been referred to the jury. The proof is clear, that he dismantled the house and chopped down the orchard and vines. Whether such conduct by appellee toward this property, which he now claims was his own, and that he had a right to destroy it, was consistent with an honest claim of ownership in himself, ought to have been submitted to the jury, and it was error for the court to take it away from them and decide the question for them.

The 14th instruction is as follows:

"While the law is that a person is not guilty of the charge of false imprisonment, where the arrest and imprisonment are made under the color of legal process, yet, although the process may have been issued regularly, by a competent officer, the jury are instructed that the person who procures such process, for the purposes of having another arrested and imprisoned, and makes a false affidavit for that purpose, knowing it to be false, in order to obtain an advantage, or to force the person arrested, to surrender his possession, is guilty of the abuse of process, and can not justify under such process."

This instruction assumes that appellant procured the process for an unlawful use, and with intent to make an illegal use of it, without any proof whatever that such was the fact. It also assumes that appellee had made a false affidavit to procure it instead of leaving that question to the jury.

The 15th and 17th instructions are both bad, because they inform the jury that if the plaintiff was using the process for the purpose of trying to get possession of the land where the house and orchard stood, then such use of such criminal process was illegal. There is no proof in this record that appellant had any such purpose in suing out the process, and the only use such instructions could have was to influence the jury against appellant.

The 19th instruction is as follows:

"The jury are further instructed that if they find the defendant guilty of malicious prosecution, as charged in the plaintiff's declaration, they will, in assessing the plaintiff's

Wilmerton v. Sample.

damages, allow him for such amount as they think from the evidence will compensate him for his loss of time, his expenses in defending against the malicious prosecution, and any other damages he may have actually suffered, if any, and in addition thereto, they may also allow such further sum as damages, as they may think is right, from the proof, as smart money, or exemplary damages, not exceeding altogether the sum of \$5,000; and in estimating the damages, the jury may take into consideration the standing of the parties in the community, the physical and mental anguish that he suffered on account of such arrest, imprisonment and prosecution, if any, and the financial condition of the defendant herein, and fix the plaintiff's damages at such sum as will not only compensate the plaintiff for all his loss and suffering, but will be a sufficient punishment to the defendant for his malicious act."

This instruction allows appellee to recover for all his expenses connected with the transaction without reference as to whether or not they were necessary in his defense or otherwise. This was too broad. It should have been limited to his necessary and reasonable expenses, incurred by reason of the alleged wrongful acts. The last clause of the instruction seems to be a direct declaration by the court that the act of the defendant was malicious.

It is hardly necessary to add that such an instruction is erroneous. The 21st instruction is as follows:

"The jury are instructed as a matter of law, that a person who is in possession of property, claiming to be the owner of the same, can not be guilty of malicious mischief in destroying such property, nor can he be guilty of larceny in regard to such property."

What we have said in discussing the thirteenth instruction applies equally to this. It was error to give it. Exceptions were taken by appellant to many other instructions given for appellee, but a discussion of all of them would lead us into too much prolixity. What has been said relating to them as a whole, and as to those we have specifically mentioned, will sufficiently indicate our views of the law. On behalf of the

defendant twenty instructions were asked, and nine of them given and eleven refused. In connection with some of the refused instructions it is proper to refer to certain evidence offered by appellant and refused by the court. It appears from the record that appellant obtained title to that part of the land on which the house stood through a sheriff's sale and deed. The execution on which the sale was made was issued after a year had elapsed from the date of the judgment. Appellant offered this deed in evidence to show title in himself, but the court rejected the evidence. This evidence certainly tended to contradict the theory of appellee, that he himself owned the house and might therefore destroy it. The deed was good until it was vacated or set aside by a court of competent jurisdiction (*Hernandez v. Drake*, 81 Ill. 43), and it was error to refuse it. It should have been permitted to go to the jury, and then the instructions asked relating to the matter should have been given. Many of the instructions asked for by appellant were also open to the objection of being argumentative, and of being repetitions of each other.

Before passing from the consideration of these instructions, we can not forbear expressing our strong and emphatic disapprobation of giving to the jury such a heterogeneous mass of ill digested and multifarious instructions. Instead of instructing the jury upon the very few and very plain principles of law involved in the case, they could scarcely fail to mislead and confuse the jury. Such practice scarcely ever fails to result in error. The court has ample power to protect itself from such abuse and should not hesitate to do so. Appellant again insists that the court erred in admitting in evidence the record of the trial and acquittal of appellee on the indictment for malicious prosecution, and also showing the record of *nol. pros.* on the indictment charging appellee with larceny.

This was also error on the part of the court. Appellant was not bound by that judgment. He was not a party to it, and although a prosecuting witness, he had no other connection with it. He had no control over the action of the court

Wilmerton v. Sample.

or either of the parties. The introduction of the judgment of acquittal in the malicious prosecution case, together with the finding of the jury that appellant, the prosecuting witness, had acted maliciously in the prosecution, and a judgment against him in costs, could not fail to have a most damaging effect on him, before the jury, and no instruction of the court that such judgment was introduced for the simple purpose of showing that such suit was ended, could prevent the jury from knowing that the prosecuting witness and appellant here had been deliberately adjudged guilty of malicious prosecution in another suit. The exhibition of the contents of that record was wholly unnecessary to prove that suit was ended. The simple fact that the prosecution was ended was all appellee had to prove, and there can be no possible objection to the clerk or anybody else who knows the fact stating that that suit was ended, and a final judgment rendered in it without showing the record at large. This precise question has been twice deliberately considered by our Supreme Court, and the rule we have here followed declared by them to be the law in the case, and the introduction of the record expressly held to be erroneous. *Corbley v. Wilson*, 71 Ill. 209; *Skidmore v. Bricker*, 77 Ill. 164; and the same rule is laid down in *Wharton on Evidence*, Sec. 777. In the case of *Skidmore v. Bricker*, *supra*, the record there shows that the circuit judge who tried the case below expressly instructed the jury that such record was introduced for the sole purpose of showing that the prosecution was ended.

The ninth of appellant's refused instructions informed the jury that if they believed from the evidence that appellant acted in good faith and upon probable cause that he should be acquitted. This was the law, and it was error to refuse it.

It appears that counsel for appellee were dissatisfied with the abstract prepared by appellant, and have themselves prepared a fuller abstract of the record, and now ask that costs of it be taxed to appellant. We think there was no necessity for this second abstract. The only useful purpose it served was to show, if possible, a little fuller, the many gross and glaring errors in this record. Appellant's abstract was full enough

for that purpose, and we think for all purposes a reasonably fair abstract. The cost of the second abstract will be taxed to appellee.

For the errors stated the judgment will be reversed and the cause remanded.

Reversed and remanded.

LACEY, J. I concur in the reversing and remanding of the case but dissent as to the rule laid down in the opinion of my brother Smith, that it was error to introduce the record of the judgment of acquittal in order to show that the prosecution had ended. I think the verdict and that part of the judgment record that shows that the jury found that the prosecution was malicious, ought not to have been admitted, for that was unnecessary and it was incompetent to prove malice in that way. But, in regard to the record showing the acquittal and discharge of the plaintiff, I think it was not only admissible but it was the only way it could be proved. It could not be shown by parol as will be seen by the following authorities: 2 Greenleaf on Ev., Sec. 452; 3 Phelps on Evidence, 568; Cole v. Hauks, 3 Monroe, 208; Dougherty v. Darsey, 4 Bibb. (Ky.); Long v. Rodgers, 19 Ala. 328; Katherman v. Sittzer, 7 Watts, 191; Store v. Crocker, 24 Peck, 81; Comisky v. Breen, 7 Ill. App. 369, and many other cases might be cited. I do not understand that there is any decision to the contrary which holds that the contents of a record may be proven by parol unless the one cited in our own statute be so considered. If, then, the termination of the prosecution can only be shown by the record, how can it be shown at all unless the record of acquittal is introduced? I do not think that any serious difficulty would arise by the introduction of such record if the jury is instructed by the court as to its purpose. I think there must have been something in the case decided by the Supreme Court that made it improper in that case, but I can not see how such a rule could be held as a general one, as it would violate one of the best known and fundamental rules of law which is recognized by all courts of judicature. In Anderson v. Friend, 85 Ill. 135, the Supreme Court held.

 Illinois Central Railroad Co. v. Slater.

that "want of probable cause is not shown by the acquittal of the accused," but no objection was raised that the record of acquittal was introduced in evidence to show the termination of the prosecution.

UPTON, J. I concur in the foregoing opinion of Judge Lacey. The termination of the original prosecution was a matter of record, and could only be shown by the record. No injury could result to either party from its introduction, and it is apprehended that the court could, upon its introduction and by an instruction to the jury, limit its application to the single purpose of showing that prosecution was ended and to that fact only. In that view it was proper to show by the record that the prosecution complained of was *nolle prosequi* and so ended.

ILLINOIS CENTRAL RAILROAD COMPANY
V.
BELFORD SLATER, ADMINISTRATOR.

Railroads—Negligence of—Personal Injuries—Action by Administrator for Causing Death of Intestate—Two Brothers Killed in Same Accident—Recovery in Action for Death of One no Bar to Recovery for Death of Other.

Where two minor brothers were both killed in the same accident, through the alleged negligence of defendant, a recovery in an action brought to recover damages for the death of one constitutes no bar to a recovery in another suit for the death of the other, although the administrator of both estates was the same person, and the heirs for whom he sued were the same in each case.

[Opinion filed December 11, 1890.]

APPEAL from the Circuit Court of Ogle County; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. W. & W. D. BARGE, for appellant.

39	69
139	200
39	69
58	254

Suing as administrator of the estate of Arthur B. Slater in the one case, and as administrator of the estate of Lewis W. Slater in the other, does not make different plaintiffs, because the plaintiff does not sue as the representative of the estate, nor for its benefit, but only as the representative of the persons named in the law, and for their benefit.

“The suit is brought by the personal representative for the benefit of the persons named in the statute, not as representing the estate, in such cases, but the persons for whose benefit the remedy is given.” 1 Woerner on the American Law of Administration, Sec. 295, p. 628. “And where the executor or administrator of the deceased is authorized or required to sue therefor, he is a mere nominal party, who sues for the benefit of the parties named in the statutes.” Field on Damages, p. 515, Sec. 649.

According to the law of Alabama, the personal representative may bring the suit in a case of this kind, and in the case of Hicks v. Barrett, 40 Ala. 291, on page 293, the court say: “Section 1938 of the code does not, in our opinion, contemplate a suit by an administrator as the representative of an estate. It imposes upon an administrator a trust separate and distinct from the administration. This trust is not for the benefit of the estate, but of the widow, children or next of kin of the deceased. The administrator fills this trust, but he does not do it in the capacity of representative of the estate. It is altogether distinct from the administration, notwithstanding it is filled by the administrator. No judgment for costs, in a suit under that section, could be properly rendered, to be levied *de bonis intestatis*.”

Under a statute like the statute of this State, the Supreme Court of Kansas held that “The right of action created by the statute is founded on a new grievance, viz., causing the death, and is for the injuries sustained by the widow and children or next of kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund when recovered is not that of the represent-

Illinois Central Railroad Co. v. Slater.

ative of the deceased, but of a trustee for the benefit of the widow and children or next of kin." *Perry v. St. Joe & Western R. R. Co.*, 29 Kan. 420, 422.

"The relation of the administrator to the fund, when recovered, is not that of the representative of the deceased, but he is a mere trustee for the widow and next of kin." *Little Rock & Ft. Smith Ry. Co. v. Townsend, Adm.*, 41 Ark. 382, 387; *Baker, Adm., v. Raleigh & Gaston R. R. Co.*, 91 N. C. 308; 2 *Thompson on Negligence*, 1294.

"Where the personal representative brings the suit, his position in respect to it and to the moneys recovered is peculiar. The cause of action is not given in favor of the estate proper. If it was, the moneys would be accounted for with the other assets and, in case of an estate otherwise insolvent, would be appropriated by the creditors. But the purpose of these statutes is to make provision for members of the family of the deceased, who might naturally have calculated on receiving support or assistance from the deceased, had he survived." *Cooley on Torts*, 268.

"Any money recovered by such an action is not to be treated as part of the estate of the deceased; creditors do not get any benefit from it." *The City of Chicago v. Major*, 18 Ill. 349; *C. & R. I. R. R. Co. v. Morris*, 26 Ill. 400. And Chap. 70, Sec. 2, of the Rev. Stat., says this amount shall be for the exclusive benefit of the widow and next of kin.

Then, according to the law in such cases the administrator represents the persons who are beneficiaries, and not the estate, and brings the suit for them and not for it, and since, in the cases under consideration, the beneficiaries are the same persons and have the same interests, and since these persons and their rights are all represented by the same individual who, as such representative, is seeking to obtain damages for them in two cases against the same railroad company, arising from the same wrongful act, which is the sole cause of action, it is quite certain that the parties are the same in both these cases.

Nor does it make any difference to say that under the first section of the statute the defendant is liable to an action if

death ensue, in case the injured party could have maintained a suit had he survived the injury, and therefore, in the event of the survival, two suits, one by each boy, could have been brought; for in that event the damages would belong to two different persons; while in case of death the right of action does not survive or inure to the estate, but a new cause of action is created by the statute, not for the estate, but for the benefit of the widow and next of kin, to whom belong all the damages occasioned by the death.

"This is a new cause of action given by this statute and unknown to the common law." *The City of Chicago v. Major*, 18 Ill. 349, 356.

"The statutes do not transfer the right of action which the deceased would have had, but create a new right of action on different principles." 3 *Sutherland on Damages*, 282; *C. B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88, 92; *Blake v. Midland Ry. Co.*, 18 Q. B. 93; *Barnett v. Lucas*, Irish Rep. 6 C. L. 247; *Safford v. Drew*, 3 Duer, 627.

"The cause of action is distinct from the one which the injured person, if surviving, would have had, and is based on a different principle." *Pierce on Railroads* (Ed. of 1881), 393.

Nor does it make them different plaintiffs or give the right of two actions, to say that the persons entitled to the damages, although the same, are beneficiaries of each of two boys, instead of one; because the damages for the loss of the lives of both belonged to these same beneficiaries, and could, therefore, be recovered in one action, as well as the damages for two buildings belonging to the same persons and destroyed by the same wrongful act of the same railroad company.

"The law treats the value of the life lost as a species of property." *North Penn. R. R. Co. v. Robinson et al.*, 44 Pa. St. 175, 179; *Hilliard on Remedies for Torts*, 512.

"The only injury from which a jury can estimate is a pecuniary injury; that is, what have the widow and next of kin lost, in a money view, by the death?" *I. C. R. R. Co. v. Weldon, Ad'm*, 52 Ill. 290, 295; *The City of Chicago v. Major*, 18 Ill. 349, 359.

"The fundamental principle is, *interest reipublicæ ut sit finis litium*—it is for the public good that there be an end to litigation." Herman on Estoppel, Sec. 52; Broom's Legal Maxims, *298; Freeman on Judgments, Sec. 247; Warwick v. Underwood, 3 Head, 235; Schmidt v. Zahensdorf, 30 Iowa, 498; Kilheffer v. Herr, 17 Sergeant & Rawle, 318, *319.

All actions for torts must be brought by the injured persons. Those nominated in the statute are the only persons of legal capacity to sustain actionable injury in cases of this character. They are entitled to the sole benefit of the suit, and the action to recover the damages must be brought by or for them. They are, therefore, either directly or indirectly parties to the litigation. In the case at bar, and the one in evidence, the beneficiaries are the same persons and had the same representative. Belford Slater is the husband of one, and the father of the others, and by or for them and himself has brought these suits to recover damages for the pecuniary injury sustained by him and them. All have a direct interest in the subject-matter and in the result. He had a right to introduce testimony, cross-examine witnesses, make objections, save exceptions, control the proceedings, and pray an appeal from the judgment. Persons occupying these relations to suits at law are parties. Greenleaf on Evidence says:

"Under the term parties, in this connection, the law includes all who are directly interested in the subject-matter, and have a right to make defense or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony and to cross-examine witnesses adduced to the other side. Persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings." "The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is, that they are identified with him in interest;

and wherever this identity is found to exist, all are alike concluded." 1 Greenleaf on Ev., Sec. 523; Herman on Estoppel, Sec. 593; Bigelow on Estoppel (2d Ed.), 46; Harmon et al. v. Auditor of Public Accounts et al., 123 Ill. 122.

"Privies.—Persons who are partakers, or have an interest in any action or thing, or any relation to another." 2 Bouvier Law Dict. 382; 5 Jacobs' Law Dict. 285.

It is not necessary that the parties in the two suits should be precisely the same. It is sufficient if they are substantially so. In the case of Hanna et al. v. Read et al., 102 Ill. 596, on page 603, the court hold that "It is sufficient for the purposes of the rule relating to a former adjudication, when relied on as an estoppel, that the parties be substantially the same." Bennett on Lis Pendens, Sec. 375, says: "While the general rule is that the suit must be between the same parties, yet it is not necessary to the sufficiency of the plea or of the defense that the parties should be precisely the same." Starkie on Evidence says: "It is not essential that either the parties or the form of action should be precisely the same if they are substantially the same." 1 Starkie on Ev., p. 192, *p. 220 (5 Am. from New English Ed.); Bigelow v. Winsor, 1 Gray, 299, on p. 302.

"Nor is the force of the rule broken by the fact that there is a nominal, if there be no substantial, difference between the parties." 2 Wharton on Ev., Sec. 780; Baker et al. v. Cleveland, 19 Mich. 230, 235; Belden v. Seymour, 8 Conn. 304, on p. 308; Livermore v. Hershell, 3 Pick. 33; Calhoun v. Dunning, 4 Dall. 120.

Moreover, the judgment in evidence is a bar to the suit, because the same evidence will sustain both cases. The wrongful act charged, the degree of care averred, the negligence alleged and the beneficiaries named, are precisely the same in these declarations. Both boys were sitting on the same seat, in the same wagon, drawn by the same horses, on the same highway, passing over the same railroad track, and were killed at the same time, in the same place, by the same alleged tortious act of the same defendant, and left surviving them the same parents, the same brothers and the same sister,

Illinois Central Railroad Co. v. Slater.

and have the same representative suing for damages which belong to all of them. The same persons saw the accident, observed the management of the train, noticed the action of the team and witnessed the conduct of the boys. The skill and judgment of the boys in the care and management of the team, the value of the loss of their lives, the character and disposition of the horses, the topography of the locality of the accident, the grade of the track, the condition of the highway, the objects adjoining the right of way and everything pertaining to this transaction, were all known to the same people, who were or could have been produced by the same process, and their entire knowledge of all these facts elicited as fully by an examination on the trial of one as of both these cases. It would be impossible to prove one, without at the same time and by the same evidence, proving the other.

“The best and most unvariable test as to whether a former judgment is a bar, is to inquire whether the same evidence will sustain both the present and the former action.” Freeman on Judgments, Sec. 259.

“And what is the same cause of action, is where the same evidence will support both actions.” 2 Addison on Torts (Dudley and Baylies’ Ed.), p. 1156; Hitchin v. Campbell, 3 Wils. 304; Hitchin v. Campbell, 2 W. Bl. 827; Bigelow on Estoppel (2d Ed.), p. 54 and note 1; Martin v. Kennedy, 2 Bos. and P. 71; Flanagan v. Thompson, 4 Hughes, C. C. 421.

Messrs. J. W. ALLABEN and DIXON & BETHEA, for appellee.

The judgment in the former suit is not a bar to this one—

1. Because the matters in controversy here were not and could not have been litigated in the other suit. They could not have been litigated therein—

a. Because the plaintiffs were not the same. Belford Slater was administrator of the estate of two distinct persons in each case; and, although the beneficiaries were the same, this fact makes the plaintiffs by statute two distinct persons. The beneficiaries are not parties. Cooley on Torts, pp. 263-4-5; Conant v. Griffin, 48 Ill. 410; 3 Lawson’s Rights, Reme-

dies & Prac., Sec. 1020; U. Ry. & Tr. Co. v. Shacklet, 119 Ill. 232; Vol. 2, Pt. 2, Smith's Leading Cases, 8th Ed., p. 955; 3 Lawson's Right, Remedies & Pr., Sec. 1025; Freeman on Judgments, Secs. 156 and 163; Bigelow on Estoppel, p. 65, 278; Cooley on Torts, p. 274; 1 Perry on Trusts, Sec. 328.

b. Because the subject-matter was not identical and the same evidence would not sustain both suits. In each suit the subject-matter was a right of action that two different persons had, that survived to their legal representatives.

2. Because damages for the death of Lewis W. Slater were not sought in the former suit; and where the subject-matter and parties of the two suits are not identical it must be shown that the matter in controversy was in fact litigated in the first suit before the second suit will be barred. Hyde v. Howes, 2 Ill. App. 140; Althorp v. Beckwith, 14 Ill. App. 628; Cromwell v. Sac Co., 4 Otto, 357.

3 Because in cases similar to this the courts have held the second suit proper. C. C. & Cin. R. R. v. Crawford, 24 Ohio St., 631; Peake, Adm'r, v. B. & O. R. R., 26 Fed. Rep. 495.

4. Because the former suit should have been specially pleaded in bar or in abatement. Freeman on Judgments, Sec. 284; Vol. 2, Pt. 2, Smith's Leading Cases, 8th Ed., 945, 951-2-3; Miller v. Manice, 6 Hill, 114; Holm v. Ritter, 12 Ill. 80; Gould's Pleadings, p. 345; Edwards v. Hill, 11 Ill. 22; Johnson v. Richardson, 17 Ill. 302; C., R. I. & P. R. R. Co. v. Todd, 91 Ill. 70.

There was no error in giving or refusing instructions.

1. It is sufficient if the instructions, as a whole, present the law fairly. T. W. & W. Ry. Co. v. Ingraham, 77 Ill. 309; Chicago v. McDonough, 112 Ill. 85.

2. Defendant's refused instruction 18 was bad. It was not necessary for the court to instruct the jury that the engineer had a right to presume that a team will stop. C. & I. R. R. Co. v. Lane, 22 N. E. Rep. 513; Railroad Co. v. Lee, 87 Ill. 454; Penna. Co. v. Frana, 112 Ill. 398; Terre Haute & I. R. R. Co. v. Voelker, 22 N. E. R. 20.

3. Defendant's sixteenth refused instruction was bad. It is not proper to instruct a jury that it is not want of ordinary

Illinois Central Railroad Co. v. Slater.

care for a train to approach a crossing at usual speed; that was a question for the jury. Penna. Co. v. Frana, *supra*; R., R. I. & St. L. Ry. Co. v. Hillmer, 72 Ill. 235; W., St. L. & P. Ry. Co. v. Hicks, 13 Ill. App. 407; Same v. Neikirk, 15 Ill. App. 112; C., B. & Q. R. Co. v. Lee, 87 Ill. 454; I., B. & W. Ry. Co. v. Hall, 106 Ill. 371; Railway Co. v. Kellam, 92 Ill. 245.

4. Defendant's twenty-seventh refused instruction was bad. The railroad company have no right to invite travelers on a highway into danger, and then charge them with negligence. C. & N. W. Ry. Co. v. Goebel, 119 Ill. 515; Rolling Mill Co. v. Johnson, 114 Ill. 57; Penna Co. v. Frana, *supra*.

The verdict was supported by the evidence, and was in conformity with the instructions.

This court and the Supreme Court have so held on substantially the same evidence and instructions. I. C. R. R. Co. v. Slater, 28 Ill. App. 73; same v. same, 21 N. E. Rep. 575.

No improper evidence was admitted.

It was proper to permit witnesses to say that if the bell had rung and whistle sounded they would have heard them. C. & A. R. R. Co. v. Dillon, 123 Ill. 570.

There was no error in the court refusing to wait for testimony of the Shaffers.

Defendant had one day and a half to get them there, after it knew they were needed. Defendant used no diligence. The affidavit shows that it could prove anything by them; and the circumstances show that it did not want them there or try to get them there. The court therefore did not abuse its discretion.

Plaintiff's instructions were good.

They were the same as given in the other trial. I. C. R. R. Co. v. Slater, 28 Ill. App. 73; same v. same, 22 N. E. Rep. 575.

C. B. SMITH, P. J. This was an action on the case brought by Belford Slater, as administrator of the estate of Lewis W. Slater, deceased, against the Illinois Central Railroad Company, to recover damages under the statute for causing the death

of Lewis W. Slater, for the benefit of his next of kin. The defendant pleaded the general issue. A trial was had resulting in a verdict against appellant for \$1,350, upon which the court, after overruling motions for new trial and in arrest of judgment, gave judgment. Appellant now brings the record here on appeal, and assigns errors on the record and asks this court to reverse the judgment.

The errors assigned and relied upon are: 1. That this proceeding is barred by a trial and final judgment in former proceeding between the same parties concerning the same cause of action. 2. That the court erred in giving and refusing instructions. 3. That the verdict was against the instructions and the evidence. 4. The reception of improper evidence and the refusal of proper evidence.

A brief statement of the facts out of which this suit arises is necessary to a correct understanding of it. Belford Slater was the father of Lewis W. Slater and Arthur B. Slater. At the time of the accident which resulted in the death of both the sons, Lewis W. was thirteen years old and Arthur B. about ten years old. On the 24th day of August, 1886, Belford Slater sent his two boys to the town of Polo, a short distance from their home, with a two-horse wagon after a barrel of buttermilk and some sugar. The team they drove was a quiet one and one which the boys had been accustomed to drive and handle. They had frequently before driven the same team to town. On the morning in question these two boys had driven to town and done their errand and were returning home. At about 11 o' clock they reached the crossing of the public highway upon which they were traveling, with appellant's railroad, and while attempting to cross the railroad track the passenger train on appellant's road collided with the wagon and instantly killed both the boys. Separate suits were brought to recover for the death of each one. Belford Slater, the father, was appointed administrator of each of them. The declaration in each case seems to be exactly alike, except as to the names of the deceased. Each declaration names the same beneficiaries, being the parents and brothers and sisters of the deceased. The suit for caus-

Illinois Central Railroad Co. v. Slater.

ing the death of Arthur B. was first tried. Upon the trial a judgment was recovered against appellant in the Circuit Court for \$1,000. The case was brought to this court on appeal, and was affirmed, and is reported in the case of the Illinois Central Railroad Co. v. Belford Slater, Adm'r, etc., 28 Ill. App. 73. The case was then taken to the Supreme Court on writ of error and there the judgment of the Appellate Court was affirmed. During the pending of that suit in the various courts this case was permitted to await the final result in that case.

The first count of the declaration in the case at the bar was as follows:

First count alleges that August 24, 1886, defendant possessed and operated railroad through county of Ogle over a public highway running east and west on section line between sections 4 and 9, T. 23, R. S. That Lewis W. Slater was then with all due care riding upon said highway in a wagon drawn by two horses, and with all due care and caution came upon said railroad at said crossing, and while so riding with all due care across said railroad, at said crossing upon said highway, in said wagon there, defendant then and there, by its servants, so carelessly and improperly drove and managed its locomotive engine and train by running the same at a high and dangerous rate of speed, and by failing to keep a proper watch for persons about to pass over said crossing, or to give such signals as would apprise such persons using due care of the approach of said locomotive engine and train, and by failing and neglecting to stop or endeavor to stop said engine and train so as to prevent injury to said Lewis W. Slater upon said crossing, that by and through said negligence and improper conduct of defendant in that behalf, said engine and train then and there struck said wagon, and said Lewis W. Slater was then and there thrown out of said wagon with force and violence and against said engine, and was thereby then and there killed; that said Lewis W. Slater left surviving Belford Slater, his father, Ruth A. Slater, his mother, Albert G. Slater, Willis A. Slater and Roy J. Slater, his brothers, and Sarah M. Slater.

his sister, and next of kin, who have been deprived of their means of support and sustained damages.

As before stated the declaration in the other case was in all respects the same, with the difference in the names of the deceased only. It will thus be seen that the two actions are as near identical as it is possible for them to be. The parties in both cases are the same. The beneficiaries are the same and the facts in both cases out of which the cause of action arose are the same.

It will thus be seen that the question as to whether this suit is barred by a final judgment in the other is fairly raised, by the conceded and admitted facts, and as clearly shown by the record in the two cases. When the case was before us before, it was earnestly contended that the evidence did not support the verdict upon the charge of negligence on the part of the defendant and due and proper care on the part of the deceased child, Arthur B. Slater. We then gave the evidence a careful and attentive study, and while it was conflicting, still it was not so against the weight of evidence as to justify us in saying the jury had erred in their conclusions. The evidence in the present case we think is not substantially different from what it was in the other case. Now, as then, it was sharply conflicting upon the material and vital questions involved, and we can not say the jury were not justified in their finding. If they believed the witnesses for the appellee then there was enough evidence to support their finding, and we would not be justified in setting aside their verdict. They are the judges of the credibility of the witnesses and of the value of their evidence.

The question, however, pressed upon us with most earnestness by counsel for appellant, and with apparent confidence, is the supposed bar of the former judgment against the suit at bar. Whether this defense can now be made successful against this suit depends upon whether the two suits are in all their legal aspects identical with each other. If they are, then the bar is complete; but if the cases are not in legal contemplation the same, then that defense must fail. We are cited to a great many authorities by counsel for appellant

Illinois Central Railroad Co. v. Slater.

upon the question before us and with which we have no contention. The rules of law which define and declare similar or identical causes of action between the same parties are so well-known and familiar that a discussion of them would be mere pedantry. The correct application of these well-known rules, however, to the ever-changing facts that present themselves for solution is not always so easy. Where an entire cause of action accrues growing out of a single act or tort, the person injured must sue for and claim all his damages in the first suit, and failing to do so, he will not be again permitted to sue for and recover any more damages in a second suit growing out of the same act, to the same plaintiff and from the same tortfeasor. But it is equally well settled that many causes of action may grow out of a single act or tort, to as many individuals as suffer damages by the wrongful act. We think the learned counsel for appellant in their very able and exhaustive argument fail to recognize this distinction and apply it to the case at bar. There is a broad and clear distinction between property in mere goods and chattels, and the rights that accrue from injury to them to their owners, and the rights that arise out of the death of a human being to those who are interested in the life and injured by the death of such person. Had two or a hundred horses been killed belonging to Belford Slater by this accident, then there would have been but a single cause of action, and all damages must have been recovered in the first suit, and the cases cited by appellant would have been applicable. But instead of horses, in which he had a right of property under the general law of the land, it was his two children, in which he had no right of property, while living (except to their services), nor in common law any right of property in them after death, nor any cause of action accruing to him or any one else by reason of their death caused by the wrongful act of another. The right to recover for the death of any person caused by the wrongful act of another is conferred by the statute, and is expressly limited by the terms of the statute to the widow and next of kin of the deceased person. The action must be brought by the personal representatives of the deceased per-

sons. Sec. 1 and 2 Rev. Stat. (S. & C. Chap. 70, p. 1290). Under this statute, upon the death of Lewis and Arthur Slater (if caused wrongfully) a separate and distinct cause of action accrued to the administrator for the use of their kindred under the statute, not exceeding in value the sum of \$5,000. By no law or process of reasoning that we know anything of did the parents or brothers and sister of these two boys have any joint and inseparable interest in their lives while living, nor in the value of their lives when dead. The law treats human beings as individuals, whether living or dead, and treats their estates as separate and distinct, unless they have commingled and joined their own property in life, but even in that case each individual must have separate administrators; joint letters of administration of the estate of two or more persons, so far as we know or are advised, are wholly unknown under our law, and never have had any existence in this State and are not recognized by our statute. The estate of each person (except in partnership affairs) must have a separate administration. Two or more persons may die at the same time and from the same cause, and they may have the same administrator, and we may carry the parallel further and suppose their heirs to be the same persons, and yet the same administrator must take out separate letters on each estate and must give a separate bond in each case and the administration throughout must be separate.

The fact that Lewis and Arthur Slater were brothers did not make their estates joint in their death any more than if they had been entire strangers to each other with their estates descending to different persons. Nor does the mere fact or accident that their father was administrator of both in the least degree aid in making the estate of his two children a joint estate, for any stranger might as well have been the administrator of one or both of them without in any wise changing the legal rights of the beneficiaries or the separate and distinct estates of each of the two boys. Had there been separate administrators here, it would hardly have been contended, we think, that the action of both must be joined, and yet the case as it is is not different, for the administrator

Illinois Central Railroad Co. v. Slater.

does not sue in his own right; he is but the officer and agent of the law; his personal relation to the deceased has no legal significance whatever. Union Ry. & Transportation Co. v. Shacklet, 119 Ill. 232.

Under our statute this remedy accrues to the administrator only if the person when living would have been entitled to recover for the injury, had death not ensued, in his own right. Now if we suppose that these two boys had suffered personal injury only from the act complained of, and that death had not ensued, it would hardly be contended seriously that they must join in an action to recover for such injury. On the contrary, it would be perfectly certain they could not join in such actions, and for the reason that the injury to each would have been his personal right of action, and it seems to us equally clear that the cause of action descended separately and distinctly for each one to his administrator, and that such separate and distinct cause of action could not be joined by the administrator. We are, therefore, of opinion that the first suit and judgment therein was no bar to the present one.

It is also insisted that the court erred in refusing some of appellant's instructions. On behalf of appellant the court gave the jury twenty-five instructions. We think after a careful examination of all these given, the appellant has no grounds for complaint. They seem to cover every possible phase of the case in a most ample and exhaustive manner, and we think the defendant had the full benefit of every legal proposition involved in the case clearly and distinctly declared to the jury by the court. The legal propositions arising upon the facts in the case are few and simple and we think they were all covered by the instructions given for appellant. The instructions given for the plaintiff seem to be the same as given on the other trial and were approved by this and the Supreme Court. A separate discussion of all the instructions would lead to too much prolixity. It is also objected that the court refused to prolong the trial and wait for the arrival of the witnesses appellant desired to examine, after the evidence was closed. No sufficient

reason is shown why the witnesses were not at the trial at the proper time and the court was not bound to wait for absent witnesses, after the evidence was closed. It was a matter in the discretion of the court.

It was also alleged as error that the court improperly refused several instructions asked by the defendant. The court refused Nos. 18, 21, 25 and 27, 35, 36 and 37. These instructions, we think, are open to the objection that they state to the jury that the existence of certain facts therein named, if shown by the proof, amount to acts of negligence on the part of the deceased, or to the exemption from the charge of negligence on the part of the engineer, instead of leaving it to the jury to say whether such acts or facts, if shown by the evidence, established the charge of negligence against the deceased or exonerated the engineer from the charge of negligence. The existence and proof of negligence is one of fact and not of law, and instructions which find and declare negligence from the existence of certain acts or facts usurp the function of the jury, and are therefore erroneous. Penn. R. R. Co. v. Frana, 112 Ill. 398. This rule has a single exception, and that is where the negligent act charged is so gross and palpable that the law will treat it as negligence *per se*. But in such case the negligent act must be so clear and conclusive that no rational argument could be made against it. The alleged acts of the negligence on the part of the deceased in this case does not fall within that exception. But while the court refused appellant's 18th and other instructions defining what acts would relieve the engineer from the charge of negligence, the court gave the 19th, covering the same principle. And to the same effect are a number of the other instructions given on motion of appellant. The 21st, 25th, 27th, 35th and 36th instructions were properly refused for the same reason. The 27th instruction was rightfully refused because it referred only to the fractious character of the team in running upon the track, without any reference to the alleged negligence of the defendant in running its train, and makes the whole case depend on whether the team became unmanageable and ran upon the track. The 37th instruction

Allison v. Maley.

was properly refused because it told the jury that the former suit, brought for the death of Arthur B. Slater, was a bar to this action, which we have heretofore held is not the law.

It is lastly urged that the court erred in permitting certain witnesses to testify for appellee that they did not hear a bell rung nor a whistle sounded, and that in their opinion if such bell had been rung or whistle sounded they could and would have heard them. This was not error. This class of evidence is expressly recognized and held proper in *Railroad Co. v. Siltman*, 88 Ill. 529, and *Chicago & Alton R. R. Co. v. Dillon*, 123 Ill. 570.

After a patient and careful study of this entire record we have been unable to find any substantial or reversible error, and the judgment must be affirmed.

Judgment affirmed.

ELIZABETH A. ALLISON

V.

MARGARET F. MALEY ET AL.

Jurisdiction—Bill in Equity—Remedy at Law—Discretionary Power to Dismiss Bill on Court's Own Motion.

The power possessed by a court of equity to dismiss a bill on its own motion, for want of jurisdiction, on the ground that the parties have a complete remedy at law, must be exercised with a sound discretion, and where to dismiss a bill on this ground would impose great and unnecessary hardship upon the parties it should not be done.

[Opinion filed December 22, 1890.]

IN ERROR to the Circuit Court of Warren County; the Hon. JOHN J. GLEN, Judge, presiding.

Messrs. PORTER & MACDILL, for plaintiff in error.

Mr. A. P. HUTCHINSON, for Charles M. Brownlee and Ralph P. Brownlee, defendants in error.

Messrs. GRIER & STEWART, for Alfred H. Rockwell, defendant in error.

Per Curiam. This was a bill filed by appellant against appellee and others, seeking an accounting. It appears that Margaret F. Maley was appointed guardian of appellant when she was about six years old, and gave a bond in the sum of \$10,000 for the faithful performance of her duty. After appellant became of age, she had her guardian cited to appear before the County Court, where after a hearing she was found to be indebted to her ward in the sum of \$800. Thomas Paxton, Alfred Rockwell and Nathaniel Brownlee were sureties on this bond. The amount found due appellant not having been paid by appellee, this bill was filed against appellee Maley, Alfred H. Rockwell and Thomas Paxton, and the heirs of Alfred M. Brownlee, praying for an accounting as to the amount due appellant from her guardian, and for a decree against her and sureties, compelling them to pay appellant the amount found due. The bill averred that Margaret F. Maley and Thomas M. Paxton were insolvent, and that Alfred H. Rockwell had been discharged in bankruptcy. The bill further averred that A. H. Brownlee had died and left his sons Charles M. and Ralph P. Brownlee as his heirs, and that these two sons had inherited from their father a large amount of real and personal estate, subject to the payment of his debts and legacies under his will. Maley and Paxton were defaulted. Rockwell set up in his answer his discharge in bankruptcy. Charles and Ralph Brownlee answered the bill, and a replication was filed. The Brownlees denied their liability.

The bill was filed December 11, 1889. The cause was heard at the May term, 1890, and after full argument had and consideration by the court the court dismissed the bill at cost of complainant for the reason stated in the decree "that the court had no jurisdiction in the cause, and because the

Allison v. Maley.

complainant has an adequate and complete remedy at law.”

From that decree complainant sued out this writ of error. The only question before us is, whether the court erred in dismissing this bill for want of jurisdiction. The record shows that the defendants did not demur to the bill, nor deny the jurisdiction of the court in their answer, nor in any other manner whatever question the jurisdiction of the court, but on the contrary answered to the merits and went to trial and submitted themselves to the jurisdiction of the court. After having answered to the merits and gone to trial and without in any manner denying the jurisdiction of the court on the hearing below, it is now too late for the parties to raise that question in this court for the first time. *City of Chicago v. Cameron*, 22 Ill. App. 91; *Stout v. Cook*, 41 Ill. 447; *Magee v. Magee*, 51 Ill. 500; *Seminary v. Gage*, 103 Ill. 175. It is, however, insisted that the court on its own motion may dismiss the bill at any stage of the proceedings when the court finds it has no jurisdiction or that there is an adequate remedy at law. This contention finds support in *Kimball v. Walker*, 30 Ill. 482, and in *Gage v. Schmidt*, 104 Ill. 106. In *Kimball v. Walker*, while the court expressed the opinion that the trial court might have exercised that power, still it was not done, nor did the Supreme Court exercise that right, but kept the case and decided it upon its merits, and stated as a reason therefor that if the jurisdiction was denied and the case dismissed, it might result disastrously to the complainant on account of the running of the statute of limitations against a suit at law. In *Gage v. Smith*, the remark was thrown in incidentally in the opinion, and no such power was exercised, and the court there held the parties themselves are estopped to raise that question for the first time in the Supreme Court, and the court there again retained the case and disposed of it upon its merits. At most, as we understand the decisions of the Supreme Court upon this question, this power of the Circuit Court to dismiss a bill on its own motion for want of jurisdiction is a discretionary power, and ought always be exercised with a sound judicial discretion, and like other discretionary powers, may be reviewed where abused or improvidently exercised.

We are of opinion that the court in this case erred in dismissing this bill at the time and under the circumstances existing at the time; the bill had been pending for over a year. The parties had been to the expense of getting ready and preparing for trial, and had, in fact, tried the case, and it was ready to be disposed of on the merits. Neither party was asking the court to exercise this arbitrary power, but both asking a decree on the merits. The consequence of dismissing the bill was likely to amount to a denial of the complainant of any remedy at law on account of the statute of limitations being set up against her in a suit at law. There was no kind of necessity of turning the parties out of the court when they were all willing to submit to its jurisdiction, and again involving them in long and expensive litigation in a suit at law, even if they did have a full and complete remedy therein, and even if it be conceded they should have brought suit at law in the first instance.

We think it was the duty of the court to have decided the case on its merits at that time, and for that error the decree will be reversed and the cause remanded, with directions to the court to refer the cause to the master to state an account between the parties, and report this finding to the court, and that upon such report being made the court shall then hear the cause upon its merits upon such report, and render such decree as the evidence and the law shall require.

Reversed and remanded.

L. J. JOHNSON ET AL.

V.

C. M. STEPHENSON AND J. R. WILSON.

Highways—Jurisdiction of Commissioners in Laying Out Road—Statutory Notice.

Johnson v. Stephenson.

Compliance with the statutory requirements as to the giving notice, by highway commissioners, of a hearing upon a petition to lay out a new road, is jurisdictional, and evidence that notices were properly posted must be preserved.

[Opinion filed December 22, 1890.]

IN ERROR to the Circuit Court of Woodford County; the Hon. S. S. PAGE, Judge, presiding.

Messrs. NEWELL & KENNEDY, for plaintiffs in error.

Mr. W. L. ELWOOD, for defendants in error.

Per Curiam. This is a writ of error prosecuted from a judgment of the Circuit Court, quashing certain proceedings had before highway commissioners to lay out a road. The highway commissioners refused the prayer of the petitioners to lay out a certain road, and dismissed the petition because there were not a sufficient number of petitioners, and because the road asked for was not a public necessity. Upon the hearing of the petition the commissioners made and signed the following order, viz.:

“At a meeting of the commissioners of highways, held in pursuance of a notice to hear reasons for and against granting the prayer of the within petition, it was decided by us to refuse the prayer of said petition for the following reasons: 1st, because said petition is not signed by the required number of land owners. 2d, because the establishment of the road proposed is not a public necessity.” From this order an appeal was taken to three supervisors, under the statute, by certain of the petitioners. Upon a hearing before the three supervisors the order of the highway commissioners was reversed in all things, and the three supervisors ordered the road opened. The proceedings had before the highway commissioners and three supervisors were brought before the Circuit Court for review upon a writ of *certiorari*. Upon the hearing the court quashed the proceedings of the three supervisors laying out said road.

This appeal is prosecuted from that order. In the view we take of the case it is necessary to notice but a single question. The statute, Chap. 130, Sec. 33, requires the highway commissioners, before proceeding to hear the petition, to give notice of the time and place of hearing by posting up at least five notices in five of the most public places in the township at least ten days before the hearing, fixing the time and place of hearing. These notices are jurisdictional and they must be posted as required before the commissioners have any authority to act. The evidence that these notices have been given as required by the statute must be preserved either by filing the notices with the proof of service with the record of the proceedings, or the commissioners must recite that fact in their order in such manner that the court can see that the notices required by the statute were given for the full time and in the manner required. In the case at bar the only evidence preserved in the record showing that such notices were given is set out in the order of the highway commissioners, which we have given in full above. It will be seen from an inspection of this order that it falls far short of being a compliance with the statute, and is, therefore, fatally defective to confer jurisdiction, which the record must show affirmatively. *Commissioners v. Harper*, 38 Ill. 103; *Corley v. Kennedy*, 28 Ill. 143; *Shinkle v. Magill*, 58 Ill. 422; *Frizell v. Rogers*, 82 Ill. 109.

The record failing to show jurisdiction on the part of the commissioners to act, everything they did was a nullity, and all proceedings by the supervisors were equally void, and the Circuit Court committed no error in quashing them.

But it was error to tax the costs of the suit to the three supervisors. They were not necessary parties to the suit and have no personal interest in its result. They did not live in the township and have acted in their official capacity in hearing the appeal. It would be most unjust to tax them with the costs of litigation which in no manner concerned them. *Alexander v. Rubensam*, 12 Ill. App. 120.

So much of the judgment as taxes costs to the supervisors must be reversed, but in all other respects the judgment is affirmed.

Affirmed in part and reversed in part.

Bailey v. Ferguson.

DANIEL BAILEY
V.
ROBERT FERGUSON.

*Landlord and Tenant—Forcible Detainer—Abandonment by Tenant
Subsequent to the Bringing of Suit—Costs.*

1. Lands can not be leased by parol for more than one year.
2. The construction of a written contract should be left to the court.
3. In an action of forcible entry and detainer this court holds, in view of the evidence, that the judgment for the defendant can not stand.

[Opinion filed December 22, 1890.]

APPEAL from the Circuit Court of Boone County; the Hon.
CHARLES KELLUM, Judge, presiding.

Messrs. ROBERT REW and JOHN B. LYON, for appellant.

Messrs. R. W. WRIGHT, C. E. FULLER and W. C. DEWOLF,
for appellee.

Per Curiam. This is an appeal from a judgment of the Circuit Court of Boone County. This proceeding was to recover the possession of the farm of appellant from his tenant, Robert Ferguson, through the agency of a forcible entry and detainer proceeding. The suit was originally begun before a justice of the peace, and was appealed to the Circuit Court, where a trial was had resulting in a judgment for the defendant. The record shows that appellant leased his farm to appellee by parol for one year from the 12th day of November, 1888, to the 12th day of November, 1889. On the 23d day of July, 1889, appellant gave appellee written notice to vacate the farm on the 12th day of November, 1889. On the 21st of October, 1889, appellant entered into a written agreement with one Mauson to farm the same land which appellee occupied on the shares, Mauson to receive a certain share of the grain and stock raised. When the 12th of November

arrived, appellee did not vacate the farm. On the 12th of November appellant went to his farm and demanded possession, but appellee refused to allow him to enter. On the 22d of November appellant brought suit against appellee for the possession of the farm in forcible entry and detainer, and notice was served on appellee; but on the 27th of November appellee left the farm, before the time of the trial. On the day set for trial appellee went before the justice and defended the action, but being defeated, took an appeal to the Circuit Court. On the trial there appellant was defeated, and he appeals here and assigns errors.

In the view we take of the case, an elaborate discussion will not be necessary. The only important question involved requiring our consideration is, whether the contract made between appellant and Manson was a lease or a mere contract to have his land farmed for him upon certain terms therein named. The contract or agreement between these parties does not purport to be a lease, but is described as a contract, and at great length defines the terms and conditions upon which the farming was to be done. We think that this contract was not a lease within the meaning of the law, so as to entitle the tenant to the exclusive possession of the farm, and be the owner of the crops raised. It amounted at most to a partnership arrangement for carrying on the farm.

But even if this agreement should be treated as a technical lease, that can not help appellee, for the proof tends to show that when this new lessee (if he be such) went and demanded possession of appellee he was refused possession, and that Manson then abandoned and surrendered his lease to appellant, and had not claimed any rights in the premises until after the suit was brought and after appellee left the premises. At all events the new tenant did not get possession but declined to have anything to do with the farm until appellee and appellant got the dispute settled up; so that when this suit was brought and when appellee left the farm, appellant was clearly entitled to the exclusive possession of his farm, and no question could arise about his new tenant, Manson, being entitled to the possession of the farm, for he had tem-

Piper v. Headlee.

porarily abandoned his lease or his contract and refused to have anything to do with it until appellant and appellee had settled it. Appellee can not now insist that the relation of landlord and tenant should exist between appellant and Mauson when they were both willing, and in fact had both abandoned the contract for the time being, by reason of the refusal of appellee to surrender possession. This being the situation of the parties at the time this suit was commenced, it left appellee on his own statement without any defense to this action, and it is very clear that appellant was entitled to recover for his costs at least, notwithstanding appellee had abandoned the farm, and thereby recognized appellant's right to the possession.

An attempt is made to show that appellee was a tenant from year to year by parol for three years. This can not be under our statute. No lease can be made by parol of lands for more than one year. The court also erred in submitting to the jury in one of the instructions for appellant to say whether the written contract was or was not a lease. It was the duty of the court to construe the contract, and not leave it to the jury.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

HIRAM H. PIPER
V.
WILLIAM N. HEADLEE ET AL.

Mortgages — Foreclosure—Misdescription—Vendor's Lien—Agency—Jurisdiction—Freehold—Evidence.

1. The rule that the payee or indorsee of negotiable paper takes it free from conflicting equities between the makers or obligees of which he had no notice, applies to equities between principal and surety, as well as other equities, and if the payee has no notice of suretyship, there is no equitable

obligation to protect the surety resting on him; he is justified in treating them both as principals.

2. The entering satisfaction of a mortgage and taking a new one, when designed by the parties to be a continuation of the first mortgage, is not a satisfaction but a continuation thereof, and as to an intervening judgment creditor of the mortgagor does not give him priority.

3. Upon a bill filed to foreclose a mortgage this court holds, in view of the evidence, certain property in question having been misdescribed, a new mortgage being given and the rights of minors involved, that the decree of the trial court can not stand, and remands the cause with directions as to the decree which should be entered herein.

4. In the case presented, this court hold that the motion of appellees to dismiss the appeal upon the ground that a freehold is involved can not be sustained, the question being as to the existence and priority of mortgage liens.

[Opinion filed December 8, 1890.]

APPEAL from the Circuit Court of Bureau County; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. KENDALL & LOVEJOY, for appellant.

This court has jurisdiction. We appealed only from that part of the decree relating to the priority and enforcement of liens. *Walker v. Prichard*, 121 Ill. 227; *Malaer v. Hudgens*, opinion of Baker, Judge, 122 N. E. Rep. 586; *Land Co. v. Peck*, 112 Ill. 432.

When Mrs. Headlee joined her husband in executing the mortgage dated September 15, 1885, she knew that her husband's interest in the Inks 80 had been mortgaged to Piper to secure the \$3,000 borrowed of him to pay for such interest. Piper's equity to have such interest applied in satisfaction of said \$3,000 was prior in time to her equity, if any she had, to have such interest applied in satisfaction of the mortgage of 1885. Taking the new notes and mortgage in 1886, for the same \$3,000, did not subordinate his equity to that of her children, as the new mortgage was given and taken on the same land intended to be conveyed by the old mortgage, and for the purpose of correcting the misdescription in the old mortgage. *Curtis v. Root*, 20 Ill. 57; *Campbell v. Trotter*,

Piper v. Headlee.

100 Ill. 281; Jansen v. Grimshaw, 125 Ill. 476; Donlin v. Bradley, 119 Ill. 423.

Admitting that, by Mrs. Headlee executing the notes and mortgage dated October 11, 1882, to secure the \$3,000 borrowed of Piper, the twenty fifty-second parts of the Inks 80 occupied the position of surety for the payment of such \$3,000; yet, Piper being ignorant of the fact that she had paid any part of the purchase money therefor, the taking of the new notes for the same debt, and a new mortgage on the land intended to be conveyed by the first mortgage, did not release such twenty fifty-second parts from the payment of such \$3,000. Only in a court of equity could defendants in cross-bill enforce any claim to the Inks 80, and if they ask equity, they should be required to do equity. The legal title is in Piper. *Neimcewicz v. Ghan*, 3 Paige Ch. 651; Same case on appeal, 11 Wend. 323.

Mr. JOE A. DAVIS, for infant appellees.

Appellant should have taken an appeal to the Supreme Court. A freehold is involved within the meaning of the statute. Sec. 89, Chap. 110, R. S.; *Monroe v. Van Meter*, 100 Ill. 347; *Sanford v. Kane*, 127 Ill. 591.

A freehold can be involved in a case made by a cross as well as by an original bill. *C., B. & Q. R. R. Co. v. Watson*, 105 Ill. 217.

Appellant had notice of the equitable rights of Grace A. Headlee in the land in controversy. Jacob Miller, who acted as one of the agents of Piper in making the \$3,000 loan on October 11, 1882, knew that Grace A. Headlee contributed \$2,000 toward the purchase price of the land, and knew that the deed from Inks and wife, of date October 11, 1882, was made to Wm. N. and Grace A. Headlee.

Notice to an agent is notice to the principal. *Williams v. Brown*, 14 Ill. 200; *Whitney v. Burr*, 115 Ill. 289; *Boyd v. Yerkes*, 25 Ill. App. 528.

The possession of Grace A. Headlee until her death, and the possession of the infant appellees afterward, was sufficient to charge appellant with notice of their equitable interest in

the land. *Williams v. Brown*, 14 Ill. 200; *Coari v. Olsen*, 91 Ill. 273; *Whittaker v. Miller*, 83 Ill. 381; *Ford v. Marcall*, 107 Ill. 136; *First National Bank v. Kurtz*, 22 Ill. App. 213.

Grace A. Headlee joined with her husband in the execution of the mortgage of date October 11, 1882, and also the one of date September 15, 1885. Piper had knowledge of this fact. This was sufficient to charge appellant with notice of all the rights, legal or equitable, of Grace A. Headlee in the land. *Bradshaw v. Atkins*, 110 Ill. 323.

By executing the release Exhibit "R," and surrendering up the notes secured by the mortgage of date October 11, 1882, Piper released said land in controversy from the lien of said mortgage. *Seymore v. Mackey*, 126 Ill. 341; *Battenhausen v. Bullock*, 8 Ill. App. 319; *Mattix v. Weand*, 19 Ind. 151.

The burden of proof is on the person who would impeach the cancellation of a mortgage to show that it was released by fraud or some mistake of fact. *Jones on Mortgages* (2d Ed.), Vol. 2, Sec. 966; *Battenhausen v. Bullock*, 8 Ill. App. 319.

The discharge of a mortgage and the surrendering up of the notes secured thereby and the taking of new notes and a new mortgage will let in intervening liens, so that they will have priority over the new mortgage. *U. S. v. Crookshank*, 1 Edw. (N. Y.) 233; *Dingman v. Randall*, 13 Cal. 512; *Lassalle v. Barnett*, 1 Black (Ind.), 150; *Jones on Mortgages*, Vol. 2 (2d Ed.), Sec. 927.

To entitle one to relieve on the ground of mistake, it must be a mistake of fact and not of law. *Jones on Mortgages* (2d Ed.), Vol. 2, Sec. 969; *Goltra v. Sanasack*, 53 Ill. 456.

If the principal debtor acquires the mortgage, this will discharge the surety. *Jones on Mortgages* (2d Ed.), Vol. 1, Sec. 114; *Fitch v. Cotheal*, 2 Sandf. (N. Y.) Ch. 29.

A wife who has mortgaged her estate for her husband's debt is in the position of a surety. *Jones on Mortgages* (2d Ed.), Sec. 114 and 942; *White and Tudor's Leading Cases in Equity* (from 6th Ed.), Part 2, Vol. 2, star page 1152; *Bank of Albion v. Burns*, 1 Sickles (N. Y.), 170.

If a mortgage is made to secure the debt of a husband, the creditor is affected with notice of the wife as surety, and

he is bound thereby. Jones on Mtg. (2d Ed.), Vol. 1, Sec. 114 and 115; Bank of Albion v. Burns, 2 Lans. (N. Y.) 52; S. C., 46 N. Y. 170; Smith v. Townsend, 25 N. Y. 479; Loomer v. Wheelwright, 3 Sandf. (N. Y.) Ch. 135.

Any extension of time without consent of surety will release him. Jones on Mtg. (2d Ed.), Sec. 114 and 942; Dodgson v. Henderson, 113 Ill. 362; Myers v. First National Bank, 78 Ill. 258; Wait's Act. and Def., Vol. 5, 240; Gifford v. Allen, 3 Met. 255; Huffman v. Hurlbert, 13 Wend. 375.

A creditor having given a release for a debt can not reserve the right to proceed against the surety, whether the release is legal or equitable. White and Tudor's Leading Cases in Equity (from 6th Ed.), Part 2, Vol. 5, star page 1113 and 1134; Nicholson v. Revill, 4 Ad. & Ell. 675; Kearsey v. Cole, 16 Mees. & W. 136; Webb v. Hewitt, 3 K. & J. 438.

A surety has a right to stand upon the very terms of his contract; any alteration without his consent will extinguish his liability, even though it be for his benefit. It destroys the identity of the contract and it ceases to be the contract to which he became a party. Wait's Act. & Def., Vol. 5, 231 and 226; Dodgson v. Henderson, 113 Ill. 360; Miller v. Stewart, 9 Wheat. (U. S.) 680.

Presumptions and equities are never allowed to enlarge or in any degree to change their legal obligations. Wait's Act & Def., Vol. 5, 189; Stull v. Hance, 62 Ill. 52; Leggett v. Humphreys, 21 How. (U. S.) 66; Ludlow v. Simond, 2 C. C. E. (N. Y.) 1.

If a new surety is substituted in place of the old one, this is a discharge, even though the new one proves worthless. Wait's Act. & Def., Vol. 5, 233; Newman v. Hazelrigg, 1 Bush (Ky.), 412; Howe v. Buffalo R. R., 37 N. Y. 297; Wolf v. Fink, 1 Pa. St. 435.

If a note is paid by a new note, it can not be kept alive as collateral to the new one. Wait's Act. & Def., Vol. 5, 229; Barnett v. Reed, 51 Pa. St. 190; Andrews v. Marrett, 58 Me. 539.

Where a principal debtor has mortgaged his own property for his debt, his property must first be exhausted before the

creditor can have recourse to that of the surety. Jones on Mtg., Vol. 1, Sec. 114; Wilcox v. Tood, 64 Mo. 388; Loomer v. Wheelwright, 3 Sandf. (N. Y.) Ch. 135; Wright v. Austin, 56 Barb. (N. Y.) 388; White & Tudor's Leading Cases in Equity (from 6th Ed.) Part 2, Vol. 2, star page 1153.

Upon the same principle, where a wife joined with her husband in mortgaging her estate, and the husband's property was also mortgaged to secure the same, she will be entitled to have her husband's estate sold first to pay the debt, not only as against him, but also as against a second mortgagee of her husband. White & Tudor's Leading Cases in Equity (6th Ed.), Part 2, Vol. 2, star page 1153; Aguilar v. Aguilar, 5 Madd. 414.

LACEY, J. The first question presented here is a motion by appellees to dismiss the appeal because, as they allege, there is a freehold involved. Under the facts of this case we are unable to see that there is any freehold involved, although we can not feel perfectly sure that such is not the case, so variant have been the decisions of the Supreme Court on the question. In C., B. & Q. R. R. v. Watson, 105 Ill. 217, it was held that "a freehold is never involved unless the primary object of the suit is the recovery of a freehold, and the judgment or decree will, as between the parties, result in one party gaining and the other losing his estate." In the case of Sanford et al. v. Kane, 127 Ill. 591, appealed from this court, that rule was disapproved and the decree of this court in that case reversed because, as the court held, there was a freehold involved. In the latter case the rule was laid down that a freehold is involved "where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue, although the judgment or decree does not result in one party gaining and the other losing the estate."

In Kerchoff v. Union Mutnal Life Ins. Co., 128 Ill. 199, where the complainant alleged the execution of a deed conveying certain real estate to the defendant, coupled with an oral agreement that the complainant should be permitted to

Piper v. Headlee.

redeem two of the lots conveyed upon certain prescribed terms and prayed that he be let in to redeem from such absolute deed on its face by paying the alleged stipulated sum, it was held that no freehold was involved. A similar holding was had in *Lynch v. Jackson et al.*, 123 Ill. 360. *Hollingsworth v. Koon et al.*, 113 Ill. 443; see same case, 13 Ill. App. 158. In *Kerchoff v. U. M. L. Ins. Co.*, *supra*, the court say: "Unfortunately our rulings have not been entirely harmonious as to what is meant by 'involving a freehold,' as that term is used in the section above referred to; but without deeming it necessary to review the several cases, we think it may be said that where the question has been considered by the court and decided, the decision has in general (though there has been one exception and perhaps more) proceeded upon the understanding that the word freehold means as that word was known to and defined by the common law, and that it does not include the mere right to that which in equity will entitle a party to a 'freehold.'"

In the *Sanford* case, *supra*, it was said, "it is the rule that bills to foreclose mortgages, or establish other liens upon land, do not ordinarily involve freeholds, because the defendant may in such cases, by the payment of the money necessary to discharge the lien, prevent the decree from being so executed as to divest him of his freehold, and usually the only question litigated is the existence of the lien, the title itself not being put in issue. The same may be said of bills to redeem where the right to redeem is the only question litigated. But in such cases, when the pleadings raise adverse claims of title between the parties which must necessarily be adjudicated in order to a decree, a freehold is involved."

Now the case at bar is a bill to foreclose a mortgage and falls within the class of cases mentioned in the *Sanford* case, *supra*, quoted, where the respondents, in case the lien is established, may redeem by the payment of money necessary to discharge the lien and thus prevent the freehold from being divested.

There is no dispute but that the land originally deeded by Inks to William H. and Grace A. Headlee, his wife, was so

deeded by mistake, instead of the E. $\frac{1}{2}$, S. E. 28; nor that the latter tract was intended; nor that Headlee and wife originally executed the mortgage dated October 11, 1882, on the land deeded by mistake, intending to mortgage the latter described land. The main issue in this case is as to whether the giving up of the original mortgage and notes, having Inks deed the title of the land to William H. Headlee after the death of his wife, Grace, and taking notes and a new mortgage from William H. on the land first intended to be conveyed and mortgaged, did not have the effect to release the interest which Mrs. Headlee had in the land from the equitable lien of the first mortgage, and also release her interest in the land from being first subject to a second mortgage executed by her and her husband, by a proper description, to appellant, from being a lien in the latter's favor superior to his lien on the husband's interest in the land described under the first mortgage, *i. e.*, whether or not her interest in the land should be first sold to satisfy the second mortgage executed by her, before the husband's interest in the land should be sold and applied on the second mortgage.

We think, then, clearly no freehold is involved; it is only a question of the existence and priority of mortgage liens. See also Patrick S. Ryan v. Sanford, Supreme Court, filed May 14, 1890, Ottawa; Hanks v. Rhodes et al., filed May 14, 1889, 21 N. E. Rep. 774, where the court took jurisdiction to decide a deed absolute on its face, to be a mortgage.

We now come to the main questions in the case. First, did the appellant release the intended mortgage lien on the land sold by Inks to William H. Headlee and wife and intended to be mortgaged to appellant by the intended grantees? It is clear in our minds that appellant never intended to release his mortgage, either as to William H. Headlee's interest or Grace A. Headlee's interest. The evidence shows that it was his intention to perfect his lien on the entire title. He procured the deed to be corrected by having the entire interest in the land deeded to William N. Headlee and then taking a new mortgage on the entire title to secure the original debt. It is insisted that the

Piper v. Headlee.

original mortgage was released of record and fully discharged, and the mortgage given by Mrs. Headlee, so far as her interest in the land in question was concerned, was thereby discharged. We do not so understand the transaction. The land described in the mortgage in error was owned by one Kasbeer, who desired to have the cloud removed from the title. It did not belong to the Headlees, and never had, nor to Ink, and neither of them had any claim on it; neither had appellant. It was proper and right that appellant should release the mortgage of record, for in reality it was only an apparent mortgage. He received no pay for it, nor any part of his debt. This action could not be regarded in the light that he intended to release his equitable right to have his mortgage corrected and to embrace the land intended. The fact that appellant released Kasbeer's land had no importance whatever, further than to show that an act of justice was done to him. If no new notes and mortgage had been taken no claim could with any show of reason be made that the release of Kasbeer's land could affect his equities as against Mrs. Headlee's heirs and the land in question. The release claimed then may be laid out of the question entirely. It is insisted, though, by attorneys for appellees, that inasmuch as the appellant took the new mortgage, and delivered up the old notes of Mrs. Headlee and her husband, the heirs' equitable interest in the land was released; that she was only security for her husband, and that appellant must be held to legal notice of that fact because his agents, to loan the money, had knowledge of the fact that Mrs. Headlee had furnished her part of the money, \$2,000, and her husband furnished \$200, and borrowed \$3,000 of appellant, and that she in fact was security for her husband's part. It is uncertain from the evidence just what relation she bore to her husband in the matter. She had an intended deed for an undivided one-half. Whether she was intended to have that interest does not appear. If it was she could not have been security for her husband for all the amount, for she should pay \$600 more. Next, the evidence does not disclose that Miller & Piper, the loan brokers, who

procured the money from appellant, were in a legal sense their agents. The Headlees employed them to procure them the money on the market and agreed to and gave them the sum of \$30 for their services.

In this employment whatever knowledge the agents had was obtained from the Headlees. Miller & Piper then applied to appellant for the loan and got it on their representations as to the security. If there was any agency it was a limited one. The evidence only discloses that Piper, of the firm of Miller & Piper, told his brother that Miller made out the papers and looked up the title; that he loaned the money for his brother to accommodate him; thought he could make a few dollars himself. He further testified that he did not know that "you could call that being his agent."

Now it may be inferred from this, that appellant trusted Miller to see that the title was all right and the papers properly made out, as a mere accommodation. It was really not necessary that appellant should know for his own security what relationship as to security existed between Headlee and wife. All appellant need know was that the land was good security and that the papers were all right. The fact of Mrs. Headlee furnishing \$2,000 was learned by Miller & Piper as Headlee's agent, and we do not think that appellant should be held to knowledge, as the investigation of this fact was not within the scope of the agency of Miller & Piper, if any existed; all he wanted to know was that the title was right and the papers properly made. In *Herrington v. McCormick*, 73 Ill. 483, and *McCormick v. Wheeler*, 36 Ill. 116, it was held that where one party employed an attorney and he obtained certain information from his client as such attorney, and afterward was employed by another party as an attorney, the last party was not held to notice of the facts obtained from the first clients by virtue of his last employment. The rule may be based on the ground that communications between attorney and client are privileged; but as we think the appellant's employment, if any, did not call for the disclosure of such facts, and as the agent's duties were to his clients, the Headlees, good faith did not require such disclosures.

Piper v. Headlee.

Perry Piper, the brother of the appellant, after being employed by the Headlees, went to his brother and got the money from him, for the Headlees, he trusting his brother to pay it over and take the notes and mortgage, Miller being trusted to look up the title. This appears to be the extent of the agency of Perry Piper and Miller on appellant's part, and this appears to be what was meant by appellant when he says he loaned the money through Miller & Piper and that the latter got the money to invest for him. It appears clear, however, that appellant had no actual notice of Mrs. Headlee's position as security, if she was such, till long after the attempted correction of the mistake, and we think he could not be held to constructive notice except that the deed from Inks was intended to be made to the Headlees jointly. He therefore had good right to suppose that the note was given jointly as principals, especially as the land was deeded to them jointly or intended so to be. The law is that "the payee or indorsee of negotiable paper takes it free from conflicting equities between the makers or obligees, of which he had no notice." *Booth v. Storrs*, 73 Ill. 439; *Neimecwicz v. Ghar*, 3 Paige Ch. 651; same case on appeal, 11 Wend. 323.

This applies to equities between surety and principal as well as other equities, and if the payee has no notice of suretyship there is no equitable obligation to protect the surety resting on him; he is justified as treating them both as principals. Therefore we think that even if Mrs. Headlee was security as between herself and husband as to the \$3,000 notes and mortgage, yet she was not released nor was her land released by the taking of new notes and the extension of time of payment, as to a portion of the notes, unless the new notes were taken in payment of the old ones, of which we think there is no proof. The circumstances of this case gave appellant a strong equity to have this mortgage satisfied out of the land intended to be conveyed and mortgaged as against Mrs. Headlee and her heirs, even though she had signed the notes as surety. As between Inks and her and her husband this \$3,000 would have occupied the position of purchase money and foreclosure enforced on equitable grounds, and it

would have made no difference that she had advanced a portion of the purchase money. The title would have been burdened with the full payment. Without the expected payment in full, the owner of the land would not have parted with the title and she could have enjoyed no part of the land; hence equity gives the grantor a lien on the land conveyed, called a vendor's lien, for the payment of the purchase money. The case of appellant is not much, if any, different in principle, as regards his equities, from what that of Inks would have been had he taken the \$3,000 mortgage as did appellant. Instead of Inks giving the credit, appellant places himself in his position, advances the money for the title, has it conveyed, or intended to be, to Headlee and wife jointly, and then by intention takes a mortgage back to secure such purchase money so advanced, all being at the same time and one entire transaction. As far as the equities of the parties are concerned, we must treat this case as though there had been no misdescription in Inks' deed and in appellant's mortgage; for it is an equitable maxim that "that in equity is treated as done that should have been done." A case very nearly in point is *Curtis v. Root*, 20 Ill. 54. It is there said: "In point of right and principle it can make no difference whether the mortgage is given to the vendor of the purchase money or to another who actually advances the means to pay the purchase money to the vendor." The same doctrine is affirmed in *Roane v. Baker et al.*, 120 Ill. 308.

By taking the new notes and mortgage, it was undoubtedly the intention of appellant to release the estate of Mrs. Headlee from any personal liability on the notes; but he was striving his best to hold the mortgage lien, and if a court of equity does not interfere as against William N. Headlee and appellant in favor of the heirs of Mrs. Headlee to recover the title to her share in the land, there can be no question but the new mortgage would be all that is necessary to secure the balance of the purchase money. When these heirs come in by their cross-bill and ask this relief, they should not be allowed to do an inequitable thing by taking Mrs. Headlee's share free from the lien of the purchase money. It appears that in

Piper v. Headlee.

taking the new notes and mortgage the debt was not increased and only the time extended as to the payment of a portion of it. The entering satisfaction of a mortgage and taking a new one, when designed by the parties to be a continuation of the first mortgage, is not a satisfaction but a continuation of the first mortgage, and as to an intervening judgment creditor of the mortgagor, does not give him priority. *Campbell v. Trotter*, 100 Ill. 281.

It makes no difference whether appellant's relief is granted on the new or old mortgage, so that the amount is not increased beyond what would have been due on the mortgage of 1882. Even if Mrs. Headlee's interest in the land had been released from the mortgage of 1882, the court below erred in holding that William N. Headlee's interest in the Inks eighty acres should be first sold in order to satisfy the \$4,000 mortgage, given by Mr. and Mrs. Headlee as a second mortgage on this tract to secure the purchase money of another tract included in the same mortgage.

The appellant had a prior mortgage on the Inks eighty, and if William N. Headlee's interest be first sold to satisfy the second mortgage then he loses his security to that extent on his first mortgage. The appellant undoubtedly had a right to the satisfaction of his first mortgage first, out of the land therein pledged. It was first given and should be first satisfied. When Mrs. H. gave the second mortgage on the Inks eighty she knew of the first mortgage, and must have known that appellant had a prior lien, and she can not complain, nor her heirs, that the Inks land be sold to pay that first.

Even if her portion of the Inks eighty is released, that can not change her relation to the first and the second mortgages which she had signed. A great advantage would accrue to her by her land being released from the first mortgage, but why should this entitle her to another by changing appellant's first mortgage into a second one and making it subsequent to the second, and thereby compelling the selling of William N. Headlee's interest in the Inks eighty, first to apply on second mortgage, so as to release her interest in the Inks eighty to

that extent from the lien of the second mortgage? We can not see any justice in this.

From what we have said it will be seen that we hold that the interest of the heirs of Grace A. Headlee in the Inks eighty so called was not, nor was that of their mother in her lifetime, released from the mortgage of October 11, 1882, by the taking of a new mortgage by appellant from William N. Headlee alone, and the land therein named is liable to be sold to satisfy the notes named in the second mortgage given for the purchase money to correct mistake, not to exceed in amount the original notes and interest, William N. Headlee's interest being first sold and applied; that this mortgage is entitled to the priority of all others; that the twenty fifty-second interest of the heirs of Grace A. Headlee, if any remains after the satisfaction of the purchase money of the Inks eighty-acre tract, secured by the first and third mortgages, be applied in payment of the mortgage of 1885 for \$4,000 and interest after the other land contained in the latter named mortgage is sold and applied to its satisfaction, and after all of William N. Headlee's interest is applied, if any remains after satisfying the mortgage of 1882.

The decree of the court below is therefore reversed and cause remanded with directions to the court below to enter a decree in accordance with this opinion.

Reversed and remanded with directions.

39	106
107	96
39	106
114	84

SPENCER BARTON

V.

J. R. HARRIS.

Practice—Overruling Motion for New Trial—Necessity of Exception.

Where a motion for new trial is overruled and the defeated party fails to except, it will be presumed that he acquiesces in the decision of the court, and it can not be assigned for error.

[Opinion filed January 9, 1891.]

Morehouse v. City of Dixon.

APPEAL from the County Court of Peoria County; the Hon. J. C. PICKNEY, Judge, presiding.

Mr. W. T. WHITING, for appellant.

Mr. S. D. WEAD, for appellee.

Per Curiam. This was an action commenced by appellee against appellant before a justice of the peace to recover damages to his corn grown on land which he had rented from one Jacob Darst. The appellant occupied a piece of land adjoining that occupied by appellee, and the fence not being kept up the cattle of appellant got through and onto the land of appellee, and committed the damages to the corn of appellee complained of and for which the judgment was rendered. This dispute is as to whose duty it was to keep up the fence.

The case was tried without a jury by the court. It appears that after the finding of the court there was a motion made for a new trial which was overruled by the court; but appellant took no exception to the action of the court in overruling the motion. In this state of the record the appellant is precluded from raising the objection that the finding of the court was against the evidence. When the record fails to show exceptions taken to the overruling of a motion for a new trial, it will be considered that the party acquiesced in the decision of the court and it can not be assigned for error. *Law v. Fletcher*, 84 Ill. 45; *Stern v. The People*, 96 Ill. 475; *James v. Dexter*, 113 Ill. 654; *Graham v. The People*, 119 Ill. 659.

These cases are decisive and the judgment must be affirmed.

Judgment affirmed.

THOMAS C. MOREHOUSE

V.

CITY OF DIXON.

39	107
85	80

Municipal Corporations—Negligence of—Defective Sidewalk—Personal Injuries—Cripple—Evidence—Instructions.

1. An instruction not based upon evidence adduced should not be given.
2. Nor one that is suggestive and argumentative.
3. Nor one that calls the attention of the jury to a fact and gives it undue prominence.
4. In an action brought to recover from a municipality for personal injuries alleged to have been occasioned by its negligence, this court holds that on account of the giving of wrongful instructions for the defendant, and the refusal of one that was proper in behalf of the plaintiff, the judgment against the latter can not stand.

[Opinion filed May 21, 1891.]

IN ERROR to the Circuit Court of Lee County; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. W. & W. D. BARGE, for plaintiff in error.

The city, knowing the defective condition of this walk, is responsible for all damages occasioned thereby. *City of Bloomington v. Bay*, 42 Ill. 503; *City of Sterling v. Merrill*, 124 Ill. 522.

The plaintiff was justified by the law in presuming that the walk was free from danger and acting on that presumption. *Weed v. Ballston Spa*, 76 N. Y. 329, 333; *Davenport v. Buckman*, 37 N. Y. 568, 573; *Joliet v. Verley*, 35 Ill. 58; *Seward v. Milford*, 21 Wis. 485.

The plaintiff was "going as I go anywhere." This is exercising reasonable care and caution. He was under no obligation to constantly think that danger might be lurking near. *George v. Haverhill*, 110 Mass. 513; *Weisenberg v. Appleton*, 26 Wis. 56; *Chicago v. Hoy*, 75 Ill. 530, 533; *Elgin v. Renwick*, 86 Ill. 498; *Wheeler v. Westport*, 30 Wis. 392, 415, 416.

The first instruction given for defendant is erroneous.

It required plaintiff to leave the walk and make a circuit around the obstruction. This is not the law. *City of Sandwich v. Dolan*, 133 Ill. 177.

The plaintiff had the right to presume the walk was safe and free from danger, and he had a right to act upon that presumption. This right absolved him from all obligation to leave the walk. *Bloomington v. Chamberlain*, 104 Ill. 268, 273.

Morehouse v. of City Dixon.

This is true, even though there was a safe way around the defect, there being nothing to prevent one passing over the defective way. *Seward v. Milford*, 21 Wis. 485; see *Aurora v. Hillman*, 90 Ill. 61, 64.

It is not based upon the evidence. No person testified that plaintiff knew the dangerous condition of this walk.

Even if the plaintiff did know the defective and dangerous condition, still he can recover, if, as the testimony shows the fact to be, his attention was momentarily diverted from his steps by some startling event. *George v. Haverhill*, 110 Mass. 506, 513; *Weisenberg v. Appleton*, 26 Wis. 56; *Wheeler v. Westport*, 30 Wis. 392, 415.

“Nor does the mere fact the plaintiff might have taken a better and safer sidewalk than the one he did take, charge him with want of ordinary care. He traveled the usual and most direct route to and from his work.” *Aurora v. Hillman*, 90 Ill. 61, 65.

The testimony shows that plaintiff was obliged to expose himself to this danger in order to perform his duties. As they compelled him to be upon this walk, the law would not exact of him as much prudence and timidity as it would of another who was under no obligation to be there. *Chicago v. Sheehan*, 113 Ill. 658, 661.

Just such an instruction as this was condemned by our Supreme Court in *Peoria v. Simpson*, 110 Ill. 294, 304.

The defendant's third instruction tells the jury that if they believe the plaintiff “was so crippled as to render him more liable than a person not so crippled to stub his toe against projections above the surface of the main walk, or to render it more difficult for him than a person not so crippled to save himself from falling in case he should so stub his toe or should step into a crack in the walk, then,” etc.

This is not supported by the evidence. No witness testified that plaintiff was more liable to stub his toe than one not so crippled. The evidence shows he stubbed the toe of his left foot. There is no testimony, whatever, that plaintiff was crippled in his left foot or leg.

There is no testimony showing it was more difficult for him

to save himself from a fall, after stumbling, than it was for others not so crippled.

It is error to give instructions not based on the evidence. *Wengor v. Calder*, 78 Ill. 275; *C., B. & Q. v. Dickson*, 88 Ill. 437, 438; *Frantz v. Rose*, 89 Ill. 594.

Moreover, defendant's second instruction tells the jurors they are "to be governed solely by the facts as they appear from the evidence." These instructions are, therefore, misleading, conflicting and confusing.

Instructions that give undue prominence to facts or rules of law are erroneous. *Mix v. Osby*, 62 Ill. 193; *Calef v. Thomas*, 81 Ill. 478.

It says that even if the defendant was negligent, still, if the jury believe the plaintiff could have avoided the injury by the exercise of reasonable care, the verdict should be for defendant.

That is not true, unless his failure to exercise such care contributed to the injury. 2 *Thompson on Negligence*, 1148, 1151; *Cooley on Torts*, 679.

There is no limitation in the law that the walk shall be kept safe for travelers. It is to be kept safe for all purposes to which it may be lawfully devoted, for recreation, pleasure, idle curiosity, as well as travel. *Chicago v. Keefe*, 114 Ill. 222, 227.

MR. EDWARD E. WINGERT, for defendant in error.

Although a person traveling upon a public sidewalk in a city has a right to presume that such walk is in a reasonably safe condition, yet it is his duty to exercise reasonable and ordinary care and prudence to avoid danger. *Chicago v. Hickok*, 16 Ill. App. 142.

The burden of proof of plaintiff's exercise of such ordinary care was upon himself in this case. *C., B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272; *Kepperly v. Ramsden*, 83 Ill. 354.

It is not error to repeat instructions, although repeated instructions may be refused without error. *Weyhrich v. Foster*, 48 Ill. 115; *Scott v. Delaney*, 87 Ill. 146.

There need be no express permission given a property

Morehouse v. City of Dixon.

holder to use the sidewalk for a reasonable time and in a reasonable manner for the storage of building materials in the absence of municipal regulations relating thereto. *Dillon Mun. Corp.* (Fourth Ed.), Sec. 730; *Clark v. Fry*, 8 Ohio St. 358, 376; *Adams v. Fletcher*, 20 At. Rep. 263.

LACEY, J. This was a suit brought by the plaintiff in error against the defendant in error to recover damages occasioned by a fall on a sidewalk in the city of Dixon, June 20, 1884, by reason of which one of his legs was injured and had to be amputated below the knee. The charge in the declaration is that the sidewalk by reason of the negligence of the defendant in error was allowed to become defective, there being large unguarded spaces between the planks, and that the plaintiff in error, while exercising due care, stumbled, slipped and fell and received severe injuries, suffering the permanent loss of his right foot.

It is alleged in the second count that the walk was defective and that the city by exercising reasonable care could have known it; and in the third count that the city had notice of the defect. The allegation is in all of the counts as to the injury. The damages were laid at \$6,000. Upon issue being joined the case was tried before a jury, the trial resulting in a verdict for the defendant in error, and upon motion for a new trial being overruled, judgment was rendered against the plaintiff in error for costs. It is assigned for error that the court gave defendant in error the first, second and third, fifth, eighth and twelfth instructions in favor of the defendant in error, and in refusing the plaintiff in error's eleventh instruction.

We have examined the instructions fully and regard the second, fifth and twelfth of defendant in error's instructions as proper. The first and third we think very improper and erroneous. The first and third instructions were as follows:

First. "You are instructed that a person has no right to knowingly expose himself to danger and then recover for an injury which he might have avoided by the exercise of reasonable care and caution, and if you believe from the evidence that the plaintiff knew of the defects and obstruc-

tions in the sidewalk, and that in passing along such walk he could have avoided passing over such defects and obstructions by taking a short circuit around them, you have to consider his failure to make such a circuit in determining whether the plaintiff exercised due and reasonable care and caution."

Third. "You are instructed that while all persons are required by law to exercise reasonable care and caution in walking on the sidewalks of a city, still, in determining what constitutes such care and caution, any defect in the parties' limbs or feet, interfering with their free and natural use (if proven), should be taken into account; and in this case, if you believe from the evidence that the plaintiff at the time of the alleged injury was so crippled as to render him more liable than a person not so crippled to stub his toe against projections above the main surface of the walk, or to render it more difficult for him than a person not so crippled to save himself from falling, in case he should stub his toe, or should step into a crack in the walk, then reasonable care would require of him that he move more cautiously and with greater care on the sidewalks than if he were not so crippled."

The first is erroneous because it calls the attention of the jury to a fact and gives it undue prominence. The mere fact of the knowledge of the defect on the part of the defendant in error and the further fact of his failure to go around the spot where the injury occurred is required by the instruction to be taken into account in determining the question of care on the part of the defendant in error. No other facts or circumstances are mentioned. This was undoubtedly a question for the jury to consider, but not the only evidence, and it should not have been singled out as though it were the only question in the case.

The third instruction is erroneous because it calls the jury's attention especially to supposed facts and because there is no evidence on which to base it. The injury was not caused by the defective foot, nor was there any evidence tending to show that it was negligence to go onto the walk with such a foot as the plaintiff in error had, any more than with a well

Morehouse v. City of Dixon.

foot. The instruction ignores the question of knowledge on the part of the defendant in error of any defect in the sidewalk, and is suggestive and argumentative throughout. We will now notice the objection to the refusal of the court to give the eleventh of plaintiff in error's refused instructions. It was to the effect that the jury had no right to draw any inference or conclusion unfavorable to the plaintiff from the fact that the said boot or shoe worn by defendant in error at the time of the accident was not before the jury as evidence in the case, and that the jury should disregard such fact and all arguments or statements concerning the same.

We think the court should have given this instruction. Under the evidence in this case the plaintiff in error was under no obligations to produce the boot or shoe in evidence, and although this evidence may have come out on the trial, it was not proper for the jury to draw any inference unfavorable to the plaintiff in error from it. The instructions should have been given for the purpose of excluding from the minds of the jury such improper evidence or the effect of it.

We have examined the evidence in the case and feel satisfied that the evidence would have sustained a verdict in favor of the plaintiff in error. We regard, therefore, the giving of the wrongful instructions for the defendant in error and the refusal of the rightful one for the plaintiff in error as material, and such action by the court may have unfavorably influenced the verdict of the jury against the plaintiff in error.

For these reasons the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

THE CHICAGO, WILMINGTON & VERMILLION COAL
COMPANY

v.

FRANK O. PETERSON.

Master and Servant—Negligence of Mine Owner—Failure to Supply Props—Laws of 1887, Secs. 14 and 16, Page 235—Evidence—Contributory Negligence—Instructions—Practice.

1. A judgment of a trial court may be reversed *pro forma* on account of the failure of an appellee to file briefs herein.

2. Gross negligence is the want of ordinary care; what constitutes ordinary care varies with the circumstances of each case; one must act under all circumstances as a reasonably prudent person should act.

3. It is against public policy to allow the provisions of a statute touching the care an employer must exercise with regard to the protection of his employes from personal injury, to be dispensed with by contract.

4. An employe injured through the negligence of his master may release him from liability therefor upon receipt of a sum agreed upon.

5. In the case presented, this court holds, in view of the evidence, that under the statute it was sufficient for the plaintiff to notify the "mine car driver" that props were necessary in the room where he was at work; that the release in question was understandingly executed and delivered by the plaintiff to the defendant, and that in view thereof the judgment in his favor can not stand.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Bureau County; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. GEORGE S. HOUSE and ECHELER & KYLE, for appellant.

No appearance for appellee.

UPTON, J. In October, 1889, and prior thereto, appellant was the owner of a coal mine in Seatonville in Bureau County, and engaged in operating the same, and employed

39	114
45	507
39	114
81	147
39	114
197	187

appellee therein as a "loader" under a contract which was reduced to writing.

The mine was operated by what is known as "long-wall work," all the coal being taken out as the work progressed.

Roadways were maintained at the base of the mine, from the elevated shaft to the coal face, and deflecting therefrom entries and branches were made, denominated "rooms." These "roadways," "entries" and "rooms," as the work progressed, required "building up" on the sides, and props with caps to sustain the roof. The "building up" was done in the night time principally, by the appellant's servants, and consisted in building or erecting a wall of stone or other solid material from the base to the roof of the mine, about three feet from the coal face, and filling in the back with dirt or other material to support the sides and roof from caving or falling in. At the time in question the mine was in part operated by mining machines which cut and removed the earth or other material from under the coal face, and between it and the "building," about four feet in depth, extending back from under the coal face some distance, that the pressure from above the coal bed might aid in breaking it down for removal.

This being done, holes were drilled into the coal face, and the coal loosened by powder blasts, so that it could be pulled down by the "loaders," placed upon the "pit cars," taken to the shaft and elevated. As the coal is taken down and removed the space between the "building" and the "coal face" increased, and it became the duty of the "loader" to secure the roof from falling by props as before stated.

It was the duty of appellant to deliver to appellee the props and cap-pieces as the same should be required, with the "miners' empty car," so that the appellee as such workman or "loader" might at all times be able to properly secure said workings for his own safety, while so engaged, and for any wilful failure so to do would be liable in damages for any direct injuries by appellee sustained arising from such neglect. Session Laws, 1887, title "Mines and Miners," page 235, Secs. 14 and 16.

On the morning of the 22d of October, 1889, appellee and his associate "loader," commonly called a "butty," went into the mine and commenced work as "loaders" where they were put at work by the pit boss of the appellant. Appellee thought the roof of the mine on the left of the room in which they were put at work required propping and commenced to prop the roof on that side as they progressed in taking out the coal, until they had used all the props. About nine or ten o'clock in the morning of that day appellee and his co-worker or "butty" both called to the driver of the "miners' empty car" to bring in more props and caps. This request was repeated many times during the day and before the injury complained of occurred, but none were brought them, though the "empty miners' cars" were driven in to them to be loaded every fifteen or thirty minutes.

At about four o'clock in the afternoon of that day and while so engaged as a "loader" in said mine, the roof on the left side of the room in which he was put at work caved in, for want of being sufficiently propped; a quantity of rock, coal and earth fell upon appellee, causing the injury complained of and for which this suit was brought. Appellee alleges that this result and consequent damage to him was occasioned by the wilful failure of appellant to comply with the provisions of Sec. 16 of the act above referred to. The action was in case, plea the general issue, trial had with jury in the Circuit Court, which resulted in a verdict for the appellee, upon which, after overruling a motion for a new trial, judgment was rendered, to which appellant excepted, and appealed to this court, and it is here insisted by appellant's counsel that the trial court erred.

1st. In giving, refusing and modifying instructions.

2d. In refusing to allow appellant to give the written contract with appellee to labor in the mine, in evidence.

3d. Appellee's receipt and release put in evidence by appellant barred appellee's right of recovery.

4th. In denying appellant's motion for a new trial.

We have not been favored with briefs or suggestions by the appellee or his counsel. Under the rules of this court the

judgment of the Circuit Court might be reversed *pro forma* and without further examination, for appellee's failure to file briefs in the case, but under the circumstances we deem it proper to determine the case upon its merits. *Asher v. Mitchell*, 7 Ill. App. 127.

First. We think the trial court erred in giving to the jury appellant's instructions numbered one, two, three and four.

In our judgment they were each and all vicious, as offered, and in no manner aided by the attempted qualification or amendment of the trial court, connecting the evidence established; that on the day of the injury, and before its occurrence, the appellee determined from examination that more props were needed or required to render the roof of the mine in which he was put at work perfectly safe, and that appellee demanded and requested them of the "empty car driver," whose duty it was to deliver to appellee props for that purpose, and that notwithstanding the props were not delivered to him, as requested, appellee still continued to work in the mines; that alone might be regarded as negligence *per se* sufficient to defeat a recovery as stated in the instructions. Appellee might have required the props out of excessive or over-abundant caution, and not actual necessity, as measured by ordinary care. Appellee was only bound to use ordinary care, and the law as laid down in the commencement of the appellant's first instruction is correct; but as amplified and sought to be applied to the case at bar in its subsequent parts in the appellant's instructions numbers two, three and four, we regard it as misleading, and not a correct statement of the law.

In our opinion the attempted modification of the instructions above referred to was useless, and the last part of the modification misleading. Gross negligence is now regarded in this State simply as the want of the use of ordinary care. Ordinary care is all that is required, but this is required in all cases. In some cases more caution is required to avoid an injury than in others, because of the variant circumstances and the different situations under which the injury may occur. In the case at bar if the appellee was waiting for props

Vol. 39.] Chi., Wilmington & Vermillion Coal Co. v. Peterson.

to sustain the roof of the mine, the delivery of which was required by statute to be made to appellee by appellant, through its servants, "empty car drivers," appellee might have been justified in continuing work (notwithstanding there was apprehended danger) for a reasonable length of time after a demand made therefor, expecting that the props would be delivered to him, when under other circumstances reasonable care would have required him to desist at once from working. One must act under all circumstances as a reasonably prudent person would act, which is denominated reasonable or ordinary care. Chicago Anderson Pressed Brick Co. v. John Sobkowiak, 38 Ill. App. 531.

In the case at bar, the doctrine of comparative negligence had no place, and in that view the instructions as amended were in our judgment erroneous and misleading.

We think under the present statute (*supra*) that appellant's fifth and seventh instructions were erroneous and should have been refused. These instructions were not aided by the modification, which was only another name or form of expression for the want of the use of ordinary care as above stated.

Second. We are of the opinion that under the statute (*supra*) it was sufficient for the appellee to notify the "mine car driver" that props were wanted for use in the room where appellee was at labor. We also think that the trial court committed no error in refusing to admit the written contract for labor in the mine, between appellee and appellant, to be read in evidence to the jury. The law of the case is controlled by the statute, and in our judgment it would be against public policy to allow its provisions to be dispensed with by any contract between the parties.

Third. On the trial in the court below the appellant offered in evidence the following release and receipt, which was read to the jury, viz.:

SEATONVILLE, ILL., Dec. 28, 1889.

"Received of the Chicago, Wilmington and Vermillion Coal Company, the sum of fifty (50) dollars, the same being received by me as satisfaction in full of all demands and

Chi., Wilmington & Vermillion Coal Co. v. Peterson.

charges of every kind and character by me held at this time against said company, expressly releasing any and all claims for damages I may have, if I have any against said company by reason of an injury by me received on the 22d day of October, 1889, in said company's mine, at Seatonsville. Witness my hand and seal this 28th day of December, 1889.

(Signed) "F. O. PETERSON. [Seal.]

"Subscribed in presence of

"GUS BUCKLAND, witness.

"BEERS, witness."

That this contract of release of appellant from all claims for any and all damages sustained by the appellee in consequence of the injuries complained of, in the suit at bar, for and in consideration of the sum of \$50, paid appellee at the time of its execution, if the execution and delivery thereof was not procured through fraud, misrepresentation or deceit of appellants or its agents, should be held to preclude and bar appellee from a recovery in this suit, none can dispute.

It is conceded that the release was read over and explained to the appellee before its execution and delivery to appellant and that appellant denied all liability for any damages in consequence of the injuries received by appellee, claiming and insisting that such injuries were caused by appellee's own negligence and want of ordinary care. That at the time of the execution of the release, appellee insisted that inasmuch as it had been customary at the mine when any of the miners were injured for a collection to be taken up for the injured person, the last of which collection so taken up amounted to \$53, to which appellee claimed he had contributed, and because the operators there at the mine were not at work, he thought appellant ought to help him some. The only objection, as we understand, which appellee or his counsel make or interpose to the efficiency of the release as a bar to this suit, is that appellee did not understand it. We think the great weight of the evidence upon that point is, that the release was understandingly executed and delivered to the appellant.

Appellee nowhere claims that he did not understand the

English language, which, as appears by the record before us, he did. He gave his evidence in the English language, signed his name to the release and manifestly understood the transaction of business in English, and the release was fully read to him, as he admits in his evidence, and explained particularly, as shown by the three or four other persons who were present at the time of its execution and delivery. If appellee did not then understand it, it was his own negligence and he can not now be heard to complain.

We think the trial court erred in not allowing appellant's motion for a new trial, and for the reasons above stated the judgment of the Circuit Court is reversed and the cause remanded for further proceedings not inconsistent with the views herein before expressed.

Reversed and remanded.

JOHN C. RIPPENTROP

V.

GARBRAND DOCTOR.

Master and Servant—Recovery of Wages.

This court affirms a judgment for the plaintiff in an action brought for the recovery of wages.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Ogle County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Messrs. HATHAWAY & BAXTER, for appellant.

Messrs. O' BRIEN & O'BRIEN, for appellee.

UPTON, J. This suit was commenced before a justice of the peace to recover wages claimed to have been due appellee from appellant for services rendered. In the justice court

Rippentrop v. Doctor.

the appellee obtained a judgment against appellant for \$23.75, which the judgment recited was for labor, and an attorney's fee of \$10 was allowed to be taxed with the costs, etc., from which judgment appellant appealed to the Circuit Court of Ogle County, in which the cause was heard with a jury, resulting in a verdict for appellee in the sum of \$23.75, upon which after overruling a motion for a new trial the Circuit Court gave judgment, and for costs and attorneys' fees of \$20, and appellant further appeals to this court. The questions presented by this record are entirely questions of fact.

That appellee had earned by his services actually rendered appellant at the stipulated contract price therefor, over and above all payments made, the sum of \$23.75, there can be no doubt. The defense here and in the court below was that appellee had agreed to work for another month and that he left appellant's service before the completion of the contract.

The appellee claimed that he was taken sick, and as he swears, left the appellant's service for that reason and with his consent and permission, and he further denied the contract for such service being for any given time, as stated by appellant. These were the only questions made in the previous trials. It is insisted in effect that the verdict is not supported by the evidence. We have carefully examined the record before us and we are not able to say that the jury were not fully warranted in their finding in the verdict rendered, and we are unable to perceive any reasonable error of the trial court in rendering a judgment upon that verdict. We understand that the claimed errors as to the allowing of attorneys' fees to appellee by the trial court, as well as all objections which might have been taken by reason of the instructions, verdict and motion for a new trial having been omitted from the bill of exceptions by agreement of parties since the appeal, have been waived, hence we have refrained from any reference thereto. Perceiving no reversible errors in the record, the judgment of the Circuit Court must be affirmed, and that judgment is affirmed.

Judgment affirmed.

OBERNE, HOSICK & Co.

v.

WILLIAM E. S. BUNN.

Negotiable Instruments—Draft—Consideration—Gaming—Stakeholder—Practice—Petition for Rehearing—Certificate of Importance.

1. In an action to recover from the defendant the amount of a draft made payable to him and drawn upon the plaintiffs by their agent, the fact being that the same covered a sum lost by such agent in gaming, this court holds that defendant was simply a stakeholder for said agent, and that as he paid out the amount thereof as directed by such agent, and had no notice of the plaintiffs' rights, the judgment in his favor can not be interfered with.

2. A defeated party in this court has his election either to petition for a rehearing, or in proper case to pray for a certificate of importance, but can not do both unless the petition for rehearing can be disposed of within the time limited by statute within which to pray for a certificate of importance.

[Opinion filed May 21, 1891.]

IN ERROR to the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. McCULLOCH & McCULLOCH, for plaintiffs in error.

Defendant knew that the purpose for which the draft was drawn was an unlawful purpose; he knew, when he obtained the money on it, that it was for an unlawful purpose; he knew, when he agreed to act as the agent of Weider in paying out the money so obtained, that he was paying it out for an unlawful purpose, and he knew that, no matter whose money it was, it was being paid out without any consideration, and that, even if it had been Weider's money, it could have been recovered back from the winners. He therefore took all risks in the transaction, and if he has received the moneys of the plaintiffs, and appropriated them to an unlawful purpose, he must make them good.

That all such transactions are void, and that there can be no such thing as an innocent party thereto, is abundantly shown

by the authorities. Chapin v. Dake, 57 Ill. 295; Town of Eagle v. Kohn, 84 Ill. 292; Tenny v. Foote, 4 Ill. App. 594; Doxy v. Miller, 2 Ill. App. 30; Bank v. Portner, 21 N. E. R. 634.

The draft itself being void, the indorsement was void, the payment was void, and no persons could acquire any rights whatever under it. Plaintiffs have therefore shown a complete right of action. Bank v. Spaid, 8 Ill. App. 493.

In the case of McAllister v. Oberne et al., at the present term of this court, the money for which plaintiffs recovered judgment was drawn upon checks drawn by Weider upon the funds of plaintiffs in bank at Peoria, and in their name. In that case the court (the same judge presiding) held the law to be as we here contend for. The only substantial difference in the cases is, that in the one case the court held the party receiving the checks to be chargeable with notice that the money was that of the plaintiffs, but in the other, for want of such notice, the party receiving it had the right to retain it.

Messrs. STEVENS & HORTON, for defendant in error.

Appellants can not recover as for money lost at gambling, since the appellee was at most a stakeholder and paid the money over to the winners before notified not to do so. Petillon v. Hipple, 90 Ill. 420; Lewis v. Bruton, 74 Ala. 317; Gregory v. King, 58 Ill. 169.

And there is nothing in the statute which allows a recovery against the stakeholder after payment. Starr & C. Ill. Stats., Sec. 180, Chap. 38.

Nor can they recover for money had and received without regard to the statute, because—

1. The appellee does not hold money which *ex æquo et bono* belongs to the appellants. Belden v. Perkins, 78 Ill. 449.

2. The appellee did not convert or appropriate the money of appellants to his own use. Hill v. Hayes, 38 Conn. 532; Nelson v. Iverson, 17 Ala. 216; Burdit v. Hunt, 25 Me. 419; Frome v. Dennis, 45 N. J. L. 515; Rembaugh v. Phipps, 75 Mo. 422; Persley v. Powers, 82 Ill. 125; Hill v. Belasco, 17 Ill. App. 194; Cooley on Torts, 452, 456.

It was therefore proper for the court to instruct the jury that the defendant could not be held liable unless he had notice while the money was in his possession that it belonged to plaintiffs.

There is nothing in any of the cases cited by appellant, since in each of them the money or property was at the time in possession of the defendant, or had been appropriated to his use and benefit.

UPTON, J. This is an action by plaintiffs in error against defendant in error, in assumpsit, for money paid by them upon a draft drawn upon them by one C. F. Weider, their agent, under the following circumstances:

Plaintiffs in error had their principal place of business in the city of Chicago and also had a branch house in the city of Peoria, which branch was under the management and supervision of C. F. Weider. The business of the plaintiff firm was that of purchasing hides, tallow, furs, etc. When Weider desired money for purchase or for deposit in bank in Peoria for salary and expenses of the business at that point, or for advances to persons of whom he made purchases, he drew drafts on plaintiffs in error in Chicago, and gave them credit therefor in his accounts when drawn. Drafts drawn in Peoria were deposited in the bank there, where Weider kept his accounts. If drawn while away they were sent direct to plaintiffs in error in Chicago. This course of dealing, however, does not appear to have been known to defendant in error. Nor does it appear that he knew Weider was in the habit of drawing drafts on the plaintiffs in error in his business, or for any purpose.

In April, 1887, Weider met with several other persons, among whom was the defendant in error, in a room at a hotel in Springfield, and engaged with some or all of them in a gambling game with cards called "poker." At the conclusion of the play there was nothing due to defendant in error.

Weider was indebted to various other persons participating in the game, and in order to pay them, Weider drew a draft in his own name on the plaintiffs in error, and made the same payable to the order of the defendant in error, for the sum

of \$400. Weider delivered the draft to defendant in error with the request that he get the money thereon, and when obtained, pay the same to certain persons whom he named, in various sums, which he specified.

In pursuance of such request, defendant in error indorsed the draft, as such payee, obtained the money, and upon its receipt paid it to the several persons designated by Weider, as he had been requested to do, receiving no part thereof himself. The draft was forwarded to plaintiffs in error, and by them paid without knowledge of its consideration or the circumstances under which it had been drawn or negotiated. The defendant in error had no interest in the draft, or in any part of the money derived therefrom; his connection therewith was that of accommodating payee only.

It does not appear that the defendant in error had any knowledge that the money to be obtained by the draft was not the money of Weider, or that the plaintiffs in error had any interest or claim thereto, until long after it was in fact paid to the several parties as directed by Weider, as before stated.

The case was heard in the trial court with a jury, a verdict obtained by the defendant in error, upon which judgment was entered against plaintiffs in error for costs, to reverse which this writ is prosecuted.

The principal errors complained of in the trial court were as to the instructions given to the jury. The defendant introduced no evidence but relied wholly as a defense to a right of recovery by plaintiffs in error, upon the want of a notice to the defendant at the time of the receipt and disbursement of the money received from the draft, that it was the money of the plaintiffs in error, in which contention the trial court sustained the defendant in error and instructed the jury accordingly.

We think the trial court held correctly, as the defendant in error had no notice that the money or any part of it belonged to plaintiffs in error, and the draft was drawn by Weider as if the fund drawn against was his own, which the law presumes without notice to the contrary. We think the

defendant in error's relation to the transaction, so far as is shown by the evidence, was that of a passive agent or stakeholder for Weider, and that as such, defendant in error should not be held as liable to plaintiffs in error in this action, inasmuch as he did not retain any part of the money received upon the draft, and had no notice of plaintiffs in error's interest therein.

In this view the other errors complained of become unimportant. See *Pettiton v. Hipple*, 90 Ill. 420; *Hill v. Hayes*, 38 Conn. 532.

The case at bar is clearly distinguishable from that of *McAllister v. Oberne, Hosick & Co.*, determined at the present term of this court. In that case appellant had notice by the check that it was in fact drawn upon the funds belonging to the appellees, and the appellant was also a participant in the money obtained therefrom. In the case at bar defendant in error had no such notice and was merely a stakeholder in effect, in no manner participating in the benefits of the illegal transaction.

The judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

Upon Rehearing.

[Opinion filed June 25, 1891.]

Per Curiam. Having duly considered the question raised by the petition for rehearing in this case, the prayer of said petition is denied.

Plaintiffs in error have prayed that in case a rehearing should be denied, a certificate of importance may be granted in order that the plaintiffs in error may prosecute an appeal or writ of error to the Supreme Court. A certificate of importance must be prayed for within the same time allowed by statute for taking an appeal to the Supreme Court, which is limited to a period of twenty days after the rendition of judgment in this court. The final judgment in this case was rendered in this court May 21, 1891, and more than twenty days have elapsed since that time. Plaintiffs in error

Wilson v. Dowse.

asked the judgment of this court upon certain alleged errors in its final judgment, by petition for rehearing, and during the time necessarily occupied in the examination of the questions raised by that petition, the time allotted for applying for a certificate of importance expired. Plaintiffs in error had their election to either apply for a rehearing, or pray for a certificate which would enable them to appeal, but could not have both remedies unless both could be made effective within the time allowed by statute for taking an appeal. The time within which a certificate of importance may be prayed for having elapsed, this court can not now entertain an application for such certificates. *Sholty v. McIntyre* (opinion filed January 10, 1891), Sup. Ct. Ill. N. E. Rep. Vol. 26, p. 655.

The application for certificate of importance is denied.

JANE H. WILSON

V.

STEPHEN DOWSE.

39	127
140s	18

Agency—Accounting—Master's Report—Exceptions.

This court declines, in view of the evidence, to interfere with a decree for the defendant upon a bill filed for an accounting.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Mr. JOHN C. PATTERSON, for appellant.

Messrs. GARNSEY & KNOX, for appellee.

UPTON, J. This was a bill in equity filed by appellant against appellee in the Circuit Court of Will County,

praying for an accounting, etc. The bill was filed December 1, 1887. Answer thereto being filed, and issue taken by replication, the cause was referred to the master of that court, to hear proofs and state an account between the parties as prayed, etc. Proofs were taken and reduced to writing by the master, and an account between the parties duly stated, report being made, which, with the evidence taken, was filed in the Circuit Court. By this report the master found due to appellee (defendant below) from appellant (complainant below) the sum of \$202.43. Numerous exceptions were taken to the findings and report of the master, by him overruled, and the same were renewed in the Circuit Court, and were then again heard and overruled, and a decree entered in that court for the appellee for the amount so found due by the master. To which appellant excepted and appealed to this court.

It seems from the evidence taken by the master that the appellant is the widow of one James H. Wilson, now deceased, who in his lifetime was a resident of Lockport, in Will County, and was engaged in loaning money. In such business he was accustomed to employ appellee, who was a justice of the peace in that village, as he needed advice or assistance. Upon the death of her husband appellant became possessed of his estate, consisting in whole or in part of notes and indebtedness due and to become due for moneys so loaned, in the collection of which and reloaning the same she employed appellee to assist her, and in so doing from time to time notes due appellant were placed by her in the hands of appellee to collect and reloan the money upon her account, which from time to time appellee did, as requested, sometimes paying the moneys received on collection directly to appellant, and sometimes reloaning the same, taking notes in her name and delivering the same to her, but no general or specific account of these various transactions was kept by either party, or settlement made, from the commencement, in 1877, until the filing of the bill of complaint herein in 1887. In 1880 appellant removed to the city of Chicago to reside. In 1887 she demanded that appellee

surrender all moneys, notes, demands and evidence of indebtedness due her, with an account of his receipts, disbursements and expenses incurred or claimed by appellee in transacting the business before stated.

Appellee thereupon surrendered to her all such notes, securities and moneys in his hands or possession to her belonging, as he claims, with a statement of his actings and doings in such transactions, including an account stated of receipts and disbursements of moneys and the amount due, etc. This account was not transcribed from any book of accounts, for none were kept by either party, but was made from memory, aided by such data and memoranda as appellee could obtain.

The account as rendered not being satisfactory to appellant this suit was commenced, the proofs taken, and cause heard, with the result above indicated. We have carefully studied this record and the evidence and proofs therein contained, in the light of the arguments of the respective counsel, and from the large volume of evidence taken we are not able, within reasonable compass, to review it in detail. We shall content ourselves by the statement of one conclusion therein, merely:

Numerous exceptions were filed to the master's report, to the overruling of which by the chancellor complaint is made, and upon which alone the error is claimed for which this appeal is taken, a few only of which we shall specifically refer to.

The first exception is not well taken. The \$24.57, taken as the basis in stating the account complained of, seems to be conceded to have been correct by the counsel for appellant, in his argument, called "a letter" to the master, under date of August 12, 1887, and he ought not now complain that the master in stating the account adopted his theory. Besides, upon close examination we are fully satisfied that both appellant's counsel and the master were correct in taking that as the basis of the account on August 12, 1887.

Fifteenth exception: Appellant insists that the allowance of the sum of \$438.34 to appellee, as credit for expenses from

February 17, 1877, to January 4, 1880, etc., was a mistake of the master, and not discovered by counsel until too late to be availed of, etc.

In this appellant's counsel is mistaken. The items composing this expense account complained of appeared in the account stated by appellant's accountant, Dyrenforth, as shown by his deposition taken August, 1888. These items were contained in the account rendered by appellee to appellant in 1887, and furnished the accountant, from which to make the statement of accounts by appellant.

The account as there stated by appellant, through her accountant, Dyrenforth, was then admitted and claimed to be correct by complainant, and it is too late now to question it. Besides, under the evidence we have no doubt of its correctness.

The further claim that appellee should be charged with the sum of \$540, paid him July 3, 1882, by one Michael Schell, is not sustained by the evidence; it was not properly chargeable to appellee. The evidence, we think, establishes the fact that the complainant received that money herself; it was paid her by appellee at the time of the execution of the release of the mortgage by complainant given to secure the notes, as we think is fully shown by the evidence. The other errors assigned in overruling exception to the master's report we have also carefully examined, and from such examination we find no error in the entire account as stated by the master, or in the decree rendered thereon, and finding no error in this record, that decree is affirmed.

Decree affirmed.

Metz v. Wood.

HENRY METZ

V.

SAMUEL E. WOOD ET AL., FOR USE, ETC.

Agency—Commission Merchants—Balance Due—Recovery of—Amendment.

In an action brought by commission merchants to recover a balance alleged to be due from defendant and another, this court holds that said persons were individually liable therefor; that a certain amendment of the declaration was proper, though made after verdict; and declines to interfere with the judgment for the plaintiffs.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Ogle County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Messrs. M. D. SWIFT and W. & W. D. BARGE, for appellant.

Messrs. J. W. ALLABEN and J. C. SEYSTER, for appellees.

UPTON, J. This action was assumpsit, commenced in the Circuit Court of Ogle County by appellees against appellant and Solomon Metz as defendants. The declaration contained the common counts only, wherein appellees claimed Solomon Metz and Henry Metz were indebted to them for stock, goods, wares and merchandise sold, money lent and advanced, etc., and being so indebted promised, etc., amounting, etc., to \$238.68. The declaration was accompanied by an affidavit of merits, etc., to which the defendants filed their plea of the general issue and affidavit of meritorious defense as to Solomon Metz, one of the defendants; a plea of statute of limitations was also interposed and issue taken thereon. The cause was heard in the Circuit Court with a jury. The appellees after verdict dismissed the suit as to Solomon Metz, and he excepted thereto. The jury returned a verdict for appellees against Henry Metz in the sum of \$238.68. After verdict rendered,

and upon motion for a new trial, appellees moved, and the court allowed the declaration to be amended (to conform to the fact, after dismissing the action as to the co-defendant, Solomon Metz) therein, stating a cause of action against Henry Metz alone, to which he excepted. A motion for a new trial and a motion in arrest having been overruled, the Circuit Court entered judgment on the verdict and the case was appealed to this court. The errors assigned challenge the action of the trial court, in allowing the appellees to dismiss the suit as to Solomon Metz and proceed to judgment against defendant, Henry Metz, in allowing appellees to amend the declaration in the court below after the verdict rendered, and in refusing to grant a new trial, because the evidence claimed was insufficient to warrant the verdict. Appellees were residents of Chicago, engaged in 1884 and until the present as commission merchants therein. During the years 1884 and 1885 they had dealings with some person called S. Metz, of Polo, Ill.; received consignments of live stock in his name, but had no personal acquaintance one with the other. Henry Metz, appellant, in person accompanied the stock so consigned and transacted the business; stated to appellees that he (the appellant) was S. Metz and the owner of the stock so shipped, and the money or proceeds upon the sale of the stock by appellees was paid to appellant, believing him to be in fact S. Metz, the consignor and shipper thereof.

Appellant, in the name of S. Metz, drew drafts upon appellees, using the moneys obtained thereon supposedly in the purchase of the stock shipped appellees, and it sometimes occurred that the shipments to appellees of stock were not sufficient to cover the full amounts of the drafts or advances made therefor, and appellant would promise to pay the difference as soon as he could, saying that he was doing business right along with appellees, and they need not be so particular with him as to such overdrafts.

In the winter of 1886, appellant being indebted to appellees in the amount of \$238.68 for moneys due in the business transactions aforesaid, conducted with appellant as S. Metz, and being pressed for payment thereof, first informed

appellees that his name was *Henry Metz*, but that S. Metz was his brother, and engaged with him, appellant, in the business transactions with appellees, and promised personally to pay appellees the balance due them, which he admitted was \$238.68, but enjoined silence upon that subject stating that his brother, S. Metz, had failed in business, and if the fact was known that appellant paid appellees it might involve appellant in financial difficulty with the creditors of S. Metz, his brother. Some time after this, appellees received a written notice from S. Metz, or his assignee, to appellees, directed as creditors of S. Metz, and upon the receipt thereof appellees sent their traveling agent to Polo to ascertain its meaning. The agent so sent by appellees met appellant in Polo, informed him of the receipt of the notice by appellees, and inquired what it meant. Appellant replied, "I don't mean Wood Bros.; they were always friends of mine, and I will not beat them out of a cent." Appellant then promised to ship stock to appellees sufficient to pay the amount due on the account claimed, and said that he, Henry Metz, owned the stock shipped appellees prior to January, 1886; that he had sufficient stock to cover the indebtedness then in the stock yards, which he exhibited to the agent, and promised to ship the same to appellees to satisfy their demand, etc. Appellant further stated that his brother, S. Metz, had been engaged in the boot and shoe business at Polo, but that he, appellant, had not been engaged therein; that appellees had no business with the shoe store, and did not come under the head of that failure, and admitted his liability upon, and promised to pay appellees' claim. This in substance was appellees' case as made by the evidence in the trial court, which in greater part was contradicted by the evidence offered by appellant; indeed, the evidence was utterly irreconcilable and flatly contradictory, peculiarly a question for the jury to determine as to the credibility of the witnesses, and they found for the appellees in this contention, and after a careful examination of this record we are unable to say they were not sustained by the weight of the evidence in so finding. Upon the question of fact under the well under-

stood rule of law we do not feel authorized to disturb the verdict of the jury. This will dispose of appellant's contention upon that point. It is claimed that the trial court was in error in allowing the dismissal of the suit as to S. Metz, and amendment of the *narr.* by the striking out of the name of S. Metz therefrom after verdict, upon the ground that the action was a joint action against Solomon and Henry Metz, and a recovery must be had against both or neither. Appellees' proof heard in the court below would seem to establish the fact claimed by appellees, that the appellant claimed to be the owner of the stock shipped and entitled to receive the money therefrom derived on sale thereof, and that he was, in fact, the S. Metz in whose name the stock was shipped and consigned to appellees, and was, at least, doing business in the name of S. Metz; and after the business was wholly closed, and it was discovered by appellees that the appellant was not in fact S. Metz, appellant claimed he was carrying on and conducting business in the name of S. Metz, and that they were not individually, but were jointly, liable therefor. But appellant's evidence as a witness on the hearing below was explicit that he had no interest in the stock shipped, out of which the indebtedness to appellees accrued, and hence obtained the money, etc., under false pretenses. This being the state of the case, both Solomon and Henry Metz would be liable to appellees for the amount due them in this suit, not jointly, but individually and severally. Solomon, because, as he testifies, he in fact received the moneys from the cattle shipped to the appellees, and that it was his individual transaction and personal business, and Henry would be liable to appellees therefor, because the moneys were procured and the business was done and credit obtained by himself, claiming to be the principal, and, in fact, the S. Metz, shipper and actual owner of the cattle or stock shipped, and upon such representations induced advances to be made by the appellees on appellant's promise to repay the same on further shipments of stock to them by him thereafter made.

If we are correct in this view the liability was not shown

Brownlee v. Village of Alexis.

by the evidence to have been a joint liability, but several, and under the present statute of amendments the trial court committed no error in allowing the amendments complained of, even after verdict. No wrong is perceived to have been done appellant thereby of which he could be heard to complain. It is not claimed that he could procure other or further evidence upon the facts then in issue. He had the opportunity of having all he offered heard, and we think substantial justice has been done in this case, and perceiving no error in the giving or refusing of instructions as offered, refused or modified, or in amendments allowed, or dismissal of parties to this proceeding, or in entering of judgment upon the verdict rendered, the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

WILLIAM L. BROWNLEE

v.

THE VILLAGE OF ALEXIS.

Municipal Corporations—Negligence—Defective Sidewalk—Personal Injuries—Notice—Evidence—Instructions.

1. A municipality must use reasonable diligence and care to keep its sidewalk in a reasonably safe condition.

2. Notice of the unsafe condition of a sidewalk may be implied if the defects complained of have existed for such a length of time that the municipal authorities, or any of its officers and agents whose duty it is to give notice thereof to the city, by the exercise of reasonable care might have known of such defect.

3. It is not necessary to a recovery that a municipality should have had notice of the condition of the particular plank which caused the injury in question.

4. Notice to a street commissioner is notice to a municipality.

5. Where repairs are made by a municipality to a sidewalk, it is bound to take notice of the character of the same, and the condition of the walk when repaired, whether safe or unsafe.

39	135
61	155
39	135
99	420

6. Actual or constructive notice is not required in cases of defective construction, whether the defects exist in method or material.

7. In the case presented, this court holds that evidence of the condition of the sidewalk in question shortly previous to the accident should have been admitted, also as to portions thereof distant from the point where the injury occurred.

[Opinion filed May 21, 1891.]

IN ERROR to the Circuit Court of Warren County; the Hon. JOHN C. BAGBY, Judge, presiding.

MESSRS. KIRKPATRICK & ALEXANDER and JAMES M. WILSON, for plaintiff in error.

It is claimed that defendant had neither actual nor constructive notice of the condition of the walk, and hence was not liable. In *Hearn v. Chicago*, 20 Ill. App. 252, it is held that notice of the unsafe condition of the walk might be implied if the defect existed for such a length of time that the authorities of the city by the exercise of reasonable care and diligence might have known of it. So in *Sheridan v. Hibbard*, 19 Ill. App. 421, it is held that if the walk had been out of repair for a sufficient length of time that the city authorities, in the exercise of reasonable care and prudence, ought to have known the fact, that would be notice. And such is the doctrine of *Aurora v. Dale*, 90 Ill. 46, and *Aurora v. Hillman*, 90 Ill. 61, and many other cases unnecessary now to refer to.

We contend we have fairly brought ourselves within the principle of these cases. It was not necessary that the village authorities should have actual knowledge of the looseness of the particular plank which happened to occasion the injury. *Weisenberg v. Appleton*, 26 Wis. 59. In *Troxel v. Vinton*, 41 N. W. Rep. 582, it is said: "This is a case like many others where a defective walk—known to be so—but not regarded as dangerous, is used for a time with safety, and then for some cause that is not and could not be anticipated, an accident results." In *Aurora v. Hillman*, 90 Ill. 61, plaintiff and many others had been in the habit of passing over the walk where the injury occurred, often, and in *Sheridan v. Hibbard*, 19 Ill. App. 421, the facts were that four persons were walking

Brownlee v. Village of Alexis.

together two and two. The first two passed safely, but the last two, one of whom was plaintiff, did not. Yet in neither case did the facts stated prevent a recovery. So it is in all cases of this nature, especially in cases arising out of defects occasioned by decay; for a time there is safety, for a time reasonably so, but the end comes and danger follows, and even then many may pass and repass without hurt. It was contended that the village officers were under no more obligation to find defects in the walk than plaintiff was. In *Kewance v. Depew*, 80 Ill. 119, it is said that "had plaintiff not known the defect he might probably have been justified in assuming that the walk was safe, and in acting upon that hypothesis." And in *Davenport v. Ruckman*, 37 N. Y. 578, it is said: "The streets and sidewalks are for the benefit of all conditions of people, and all have the right, in using them, to assume that they are in good condition, and to regulate their conduct upon that assumption. A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty and that the street or the walk is in safe condition. He walks by a faith justified by law, and if his faith is unfounded and he suffers an injury, the party in fault must respond in damages."

If the members of the board did not possess the requisite skill to discharge the duty of inspection, then it was their duty to provide some one possessing such skill. *Thompson on Trials*, Sec. 1757. When a bridge has stood for the time timbers are expected to last, and it may be reasonably expected that decay has set in, it is negligence to omit all proper precautions to ascertain its condition. In such a case appearances will not excuse the neglect. 2 *Thompson, Negligence*, 796, citing *Rapho v. Moore*, 68 Pa. St. 404. In *McLeansboro v. Lay*, 29 Ill. App. 478, it is said: "It appears this walk had been built a length of time sufficient for the city authorities to have learned how it was constructed and the kind of materials used, and under the circumstances, no other notice of its condition would be necessary. Ordinary observation was sufficient to inform the city authorities that the walk constructed as it was and with such material as was

used might not be reasonably safe." So in *Wheaton v. Hadley*, 30 Ill. App. 564, the court say: "When a sidewalk has stood as long as this one and become rotten from exposure to the weather and time, the authorities ought to be held to have constructive notice of its condition, for with reasonable care such condition could be easily ascertained." And in *Sheridan v. Hibbard*, 19 Ill. App. 459, it is said that it was the duty of the village "to use ordinary care and diligence in the erection and maintenance of its sidewalks," and it was held that this duty includes discovery of the defects in a sidewalk. Many other cases might be cited to the same effect. This duty of inspection and care, then, was one that the board could not without fault neglect.

Crossley and McBride, agents of the village, knew the exact condition, or were ignorant through negligence. Knowledge on the part of the street commissioner was notice to the village. *Fuller v. Jackson*, 46 N. W. Rep. 721. As was well said in *Wheaton v. Hadley*, 30 Ill. App. 564, "it was evident that the walk could not be placed in a good sound condition without new material." The village, in causing these repairs to be made in the manner they were done, was guilty of gross negligence. *Chicago v. Herz*, 87 Ill. 541. "There is no question but that those in charge of the walks had full knowledge of that fact, and attempted to repair the same about three weeks before the injury to appellee. It appears that some new boards were substituted for others decayed, but no new stringers were put in. The proof tended to show that the walk was not in fact repaired so as to render the same safe and in good repair and condition. If this was so, the municipal authorities are chargeable with notice of it. If the authorities attempted to repair this walk, and, as the evidence attempted to show, the stringers were so decayed as to be incapable of holding the nails with which the boards constituting the walk were intended to be fastened, the authorities must have known it. If the town had laid a new walk out of defective material, from which an injury resulted, the town would have been chargeable with notice of the defect. So, in this case, if the authorities, having both

Brownlee v. Village of Alexis.

actual and constructive notice of the defective condition of the walk before the repairs were made, so made the repairs that the walk was left in unsafe condition and repair because of the defective material therein, they would be liable for injury resulting from such defect." *Wheaton v. Hadley*, 23 N. E. Rep. 423, 131 Ill. 640. If the city caused the work to be done, it was bound to take notice of its character and of the walk, whether safe or dangerous. *Chicago v. Brophy*, 79 Ill. 277. Neither actual nor constructive notice is required to be shown in cases of defective construction. *Village of Mansfield v. Moore*, 21 Ill. App. 326. If the road officers patch up a rotten bridge with a view of making it last until the next spring, they become *quasi* insurers of travelers who use it in the meantime. 2 Thompson on Negligence, 796, citing *Humphreys v. Armstrong Co.*, 56 Pa. St. 204. These authorities in addition to those already cited, as we think, abundantly sustain our position, not only upon the point under discussion, but also show erroneous rulings, on the part of the court, upon the admission and rejection of evidence and upon the instructions.

Messrs. PEPPER & SCOTT and GRIER & STEWART, for defendant in error.

As to the law, we have no contest with rule of law as established in cases referred to by counsel. In *Alexander v. Mt. Sterling*, 71 Ill. on page 368, the court say: "Had this sidewalk been repaired but a few days before the accident it would go far to exonerate the defendant from the charge of negligence." And if there had been evidence to sustain it, the court would have held the instruction good. And there the walk was defectively constructed. In the case of the *Village of Sheridan v. Hibbard*, 19 Ill. App. 429, the court holds that an instruction that says that "the village is bound to use ordinary reasonable care and diligence," is good law. The walk in that case was made of inch boards; they were broken and split; had been down for four, five or six years, had always been out of repair and no attempt made to look after it or repair it; there was no fault in stringers. In the case

of *City of Aurora v. Hillman*, 90 Ill. 61, the stringers were rotten, would not hold nails and had been so for a long time; had been bad for years; the street commissioner said it was bad and the authorities had been notified, and no attempt had been made to repair the walk or make it safe. In the city of *Aurora v. Dale*, 90 Ill. 46, the sidewalks were bad in every direction and had been so so long that the authorities ought to know it, and no evidence was offered to show that any care was used, any repairs made, or anything done for the protection of the citizens. The law in that case, and applicable to the case at bar, is laid down as follows: "If the walks are properly constructed the authorities have the right to presume they will remain safe until long use or natural decay make them unsafe, and then, until notice is given or long delay has transpired after they become apparently unsafe, there is no liability for accidents, and sufficient time must elapse after notice to make repairs." The case of *Hearn v. The City of Chicago*, 20 Ill. App. 246, shows that the construction was bad in the beginning. In the case of *Troxel v. Vinton*, 41 N. W. Reporter, 582, the walk had been out of repair for nearly a year and the officers of the city had been notified thereof.

Doubtless the law quoted from *Thompson on Negligence* is good, but has no application to a case where the supervisory officers are going over it and repairing every visible defect and every defect that can be found on examination. In *McLeansboro v. Lay*, 29 Ill. App. 478, the walk was constructed of old plank; they soon rotted at the ends; would not hold nails; had been built a long time; the city officials had looked at it and saw the defects; the man sent to repair it was ordered to nail down the rotten boards, when new ones should have been put in. In the case of *Kewanee v. Depew*, 80 Ill. 119, the boards were but inch material; had been there so long that a hole had rotted in the board in plain sight large enough for a person's foot to go through, and no one had looked after it or attempted to repair it. The case of the *Town of Wheaton v. Hadley*, 30 Ill. App. 564, is the case counsel are arguing, and they insist that the facts of that

case are the facts in this case, when there is not a shadow of semblance between them. In our case there was no sagging of the walk, not a single decayed board, not a decayed spot in the whole of the last laid stringers, or if one, only the one presented by the exhibit, and that not found where the board tripped up with plaintiff.

URTON, J. This was a suit by the plaintiff in error to recover damages for injuries received on account of the alleged defective condition of a sidewalk in the defendant village.

The alleged facts, which seem to be sustained by the evidence, are, in brief, that on the morning of July 1, 1889, plaintiff in error was traveling over a sidewalk in the defendant village, which it was bound to keep in repair, from the business portion thereof to his dwelling place situate therein, accompanied by his two daughters, the one six and the other about thirteen years of age, plaintiff in error carrying in one hand a scythe and hoe and in the other a package of coffee, the elder daughter walking by his side and the younger a few steps in advance. Near the steps of the United Brethren Church in that village, the elder daughter—walking on the outside—stepped on the end of a loose board or plank, of which the sidewalk was in part composed, which flew up, tripped the plaintiff in error and he fell upon the scythe, splitting his left hand open between the fingers nearly to the wrist, by which injury he is permanently disabled. The fact as to the injury, the extent and manner of its occurrence, is conceded. No claim is made that plaintiff in error was negligent, or that he in any way contributed to the resulting injury.

The only question involved in this contention now is, was the defendant in error guilty of negligence in not keeping its sidewalk at the time and place when the injury occurred in a reasonably safe condition for the use of a person traveling upon it, using due care, and if the same was not in such repair, had defendant in error actual or constructive notice (by lapse of time or otherwise) of such defect.

If an affirmative answer be given, then the judgment of the

Circuit Court should be reversed; if in the negative, that judgment must be affirmed.

In the Circuit Court a verdict and judgment was rendered against the plaintiff in error. He brings the suit to this court by writ of error, and complains that the trial court erred in refusing evidence offered on behalf of plaintiff in error, in modifying the instructions offered by plaintiff in error, and in giving erroneous instructions to the jury in behalf of the defendant in error, in excluding proper evidence offered by plaintiff in error and in refusing a new trial. The controversy in the trial court was purely one of fact, sharply contested on both sides; the evidence was conflicting, and consequently it became important that the jury should have been accurately instructed as to the law of the case.

It might not be proper for us to discuss in detail the testimony in this record, in the view we take of the case, but a mere reference to some of the established or undisputed facts may be allowed, to the better understanding and applications of the principles hereafter stated. The walk in question has been in use for a period of thirteen or fourteen years, and is situate upon one of the main streets of the village of Alexis. It was originally constructed of two-inch pine plank placed upon and nailed to pine wood stringers two by six inches, laid upon the ground.

Some six or seven years prior to the injury the walk had been relaid by the village authorities; in so doing some new material and some of that taken from the old walk was used, planks as well as stringers.

The old stringers were then more or less decayed; those then unfit for use were replaced by new ones, but what proportion of the old stringers were used in relaying the walk does not appear. The planks in this walk near where the injury occurred had become loose in consequence of the stringers not holding the nails, either from decay or use, and the street commissioners of the village, pursuant to its orders, had notice of such defects several times within a few months prior to the injury, and had examined the walk and attempted to and, as they supposed, had repaired such defects by nailing

Brownlee v. Village of Alexis.

the loose plank down, but without examination of the condition of the stringers to determine whether they were decayed or otherwise. These repairs last mentioned were commenced by one Crossly, acting street commissioner of the village, on the 27th of April, 1889, who in passing over the walk found several loose plank near where the injury subsequently occurred, and he nailed the loose plank to the stringer, and he testified that the nail did not drive as if the sill or stringer was solid at that time; and he further testified that the cause of the planks being loose was that the nails drew out of the stringers.

About the middle of June, 1889, one McBride, then street commissioner of the village, carefully examined this walk, and then found a number of plank loose near where this injury complained of occurred, and he also nailed the plank down found loose. Again, about ten days thereafter, and shortly prior to the injury, he went over and examined the same walk again, for the purpose of repairs, and then found loose planks in that walk and again nailed them down, and he says the occasion of the planks being loose was that the stringers did not hold the nails. Six or seven other witnesses testified that they passed over the walk in question varying from one day to six weeks prior to the injury; that they saw loose planks in the immediate vicinity of where the injury occurred; some of these witnesses were tripped by the loose plank in the walk as they testify.

To rebut this, much testimony of facts and circumstances was heard, a large part being negative in character.

The rule of law is, that notice of the unsafe condition of a sidewalk may be implied, if the defects complained of have existed for such a length of time that the municipal authorities of the city or village, or any of its officers or agents, whose duty it was to give notice thereof to the city, by the exercise of reasonable care and diligence, might have known of such defect. *Hearn v. Chicago*, 20 Ill. App. 249; *Sheridan v. Hibbard*, 19 Ill. App. 442; *Aurora v. Dale*, 90 Ill. 46; *Aurora v. Hillman*, 90 Ill. 61. Nor was it necessary to a recovery that appellee should have had notice of the condition

of this particular plank which occasioned the injury. *Weisenberg v. Appleton*, 26 Wis. 59; *Aurora v. Dale*, *supra*. Notice of the condition of the walk and the soundness or unsoundness of its materials to the street commissioners was notice to the village. *Fuller v. Jackson*, 46 N. W. R. 721; *Wheaton v. Hadley*, 30 Ill. App. 564.

The case last cited is in many of its facts similar to the case at bar.

The repairs being made by the village, of the walk in question, it was bound to take notice of the character of the repairs and the condition of the walk when so repaired, whether safe or dangerous. *Chicago v. Brophy*, 79 Ill. 277; *Chicago v. Herz*, 87 Ill. 541.

Neither actual nor constructive notice is required in cases of defective construction, whether such defects exist in method or material. *Village of Mansfield v. Moore*, 21 Ill. App. 326; *Wheaton v. Hadley*, *supra*. We think the trial court erred in confining the plaintiff's evidence to that particular part of the walk in question where the injury occurred. *Weisenberg v. Appleton*, 26 Wis. 56; *Sheridan v. Hibbard*, *supra*; *McLeansboro v. Lay*, 29 Ill. App. 478; *Aurora v. Hillman*, *supra*; *Chase v. Chicago*, 20 Ill. App. 274; *Shaw v. Village of Sun Prairie*, 42 N. W. R. (Wis.) 271. The trial court erred, we think also, in not allowing the witness, Charles Clute, called by plaintiff in error, to testify as to notice by the village authorities of the bad condition of the walk in question, and its need of new material for its repair in 1888. It was not so remote under the evidence as to warrant the court in excluding it from the jury. *Chicago v. Bixby*, 84 Ill. 85; *Chicago v. Herz*, *supra*; *Chicago v. Crooker*, 2 Ill. App. 279; *Aurora v. Dale*, 90 Ill. 48; *Aurora v. Hillman*, 90 Ill. 64.

We are also of the opinion that the trial court erred in modifying plaintiff in error's instructions numbers two, five, seven, nine and fifteen, and giving the same to the jury as modified.

The law is, as we understand it, that municipalities are required to use *reasonable* diligence and care to keep its sidewalks in a *reasonably* safe condition.

Edwards v. Martin.

The instructions as modified informed the jury that such walks were required to be kept in *ordinarily* good and safe condition. The distinction between what is *reasonable* and what is *customary* must be apparent.

We think the trial court was in error in its modification of plaintiff in error's instructions numbers thirteen and fourteen as modified and read to the jury. We think they were misleading. We are also of the opinion that the trial court erred in reading and giving to the jury the defendant in error's instructions numbers eight, nine and ten, and that the same were misleading.

We have carefully examined this record in the light of the able arguments of the learned counsel for the respective parties, and we are clearly of the opinion that the verdict in this case can not be supported by the evidence in this record.

The judgment of the Circuit Court is therefore reversed, and the cause is remanded for further proceedings not inconsistent with the views above expressed.

Reversed and remanded.

LYDIA A. M. EDWARDS, ADMINISTRATRIX,

v.

HANNAH E. MARTIN.

Husband and Wife—Ante-nuptial Contract—Construction of—Widow's Award.

1. Marriage is a sufficient consideration for an ante-nuptial contract fairly and understandingly entered into.

2. A wife may waive any and all right to any portion of her husband's estate by such agreement and be bound thereby, where fraud, collusion, overreaching or advantage taken can not be shown.

3. In the case presented, this court holds that under the agreement in question the widow was not entitled to widow's award in her husband's estate, and that the judgment in her favor can not stand.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Messrs. SHERWOOD & JONES and J. W. RANSTEAD, for appellant.

It is said in the appellee's answer, that she has received no consideration for the waiver of her widow's award, and for that reason the contract is not obligatory on her. A similar defense was set up to defeat an ante-nuptial contract in the case of McGee et al. v. McGee et al., 91 Ill. 548, where the question was whether the contract barred the widow's dower and homestead. There were minor children in that case and it was held that the widow was entitled to a homestead, but not to dower; and the court said: "Another point made is, the husband parted with nothing that had belonged to him which the intended wife could accept in lieu of dower, and for that reason, it is said, she could not be barred from claiming dower in the lands of her husband, as given by statute, either in law or in equity. The objection rests upon a misapprehension of the legal effect of the contract. It will be remembered the agreement was made in 1857, in contemplation of a marriage soon to take place between the contracting parties, and ancillary to that event. In the agreement it was recited that both parties were then the owners of real and personal property, and that the intended wife, as heir of Horace Lender, would be entitled to other property, real, personal and mixed. As the law then was, the husband, on the consummation of the marriage, would succeed to the absolute ownership of the personal property of the wife, and would also be entitled to curtesy in his wife's real estate, as well as the usufruct thereof. Thus it is seen the husband relinquished all the right which, by the marriage, he might have acquired over the estates of his wife, and, in consideration of his agreements, she also released all rights in the estate of her intended husband, which the law would cast upon her in consequence of the marriage. It is conceded the husband, during his lifetime, abided by his part of the agreement, and that each of them "owned and managed their separate prop-

erty. The contract is in our judgment, a reasonable one. It is one that persons advanced in life could with great propriety make," etc.

In the present case the appellee had considerable property of her own. If there had been no contract, and the appellee had died before Mr. Martin, he would have been entitled to the homestead and dower in the real estate and to one-third of her personal property; this right he relinquished by the contract. This was, in itself, a good and sufficient consideration. In *Barth v. Lines et al.*, 118 Ill. 374, where the widow claimed dower, notwithstanding an ante-nuptial agreement similar to the one here, it was urged that the intestate had surrendered nothing to the widow as a consideration of the release of her dower; in that case the widow owned real estate worth about \$2,000, and had some personal property. The court said: "By the agreement he released all claim to the interests which the law would thus have given him in her estate, and empowered her to dispose of it by will from any dower rights therein, on his part. She made the same relinquishment to him of whatever interest the law would give her in any of his property. He was a farmer, and she kept a store; each was to control and manage his or her own property, free from any interference by the other." It was held that the agreement barred the widow's dower.

In these cases, as will be seen, it was held that an agreement on the part of the intended husband to release all claims in his wife's property was a sufficient consideration for her agreement to release her dower in his real estate. Why should not such an agreement be a good consideration for the release of the widow's award also? If the contract binds the widow in one case, why not in the other, when there are no children interested? In *McMahill v. Est. of McMahill*, 113 Ill. 461, and in *Spencer v. Boardman et al.*, 118 Ill. 553-558, the rule of law is settled that where there are no children who have an interest in the award, and where the widow by an ante-nuptial contract fairly made has waived her right to the award, she will be bound by the contract.

In the present case the appellee's agreement was, in case

she should survive her husband, to release "all right of dower and all right of support or claim or interest of every kind or description" in his estate, and it "shall be right and lawful for him or his heirs, executors, administrators or assigns, to take possession of all that remains of the above said property, and dispose of the same, independent of the party of the second part forever." This is broad enough to include the widow's award.

Messrs. THOMAS J. RUSHTON and HENRY E. WILLIS, for appellee.

Appellant says in hunting for a consideration for the contract, the burden of which is on her to establish, that if there had been no contract, and appellee had died first, that Martin would have been entitled to the homestead and dower in the real estate and one-third of her personal property. This right he relinquished by the contract, which was in itself a good and sufficient consideration. To refute the statement or exhibit the fallacy of appellant's theory in that particular we call the court's attention to a case cited by appellant, wherein it is decided that "the policy of the law in relation to homesteads is to preserve the same for benefit of the family, and not allow the same to be defeated by any ante-nuptial contract. *McGee et al. v. McGee et al.*, 91 Ill. 548; *McMahill v. McMahill*, 105 Ill. 596.

Appellant's counsel says that "the rule of law is settled that where there are no children who have an interest in the award, and where the widow by an ante-nuptial contract fairly made has waived her right to the award, she will be bound by the contract.

Appellee says: "The rule of law is settled that a widow is entitled to the award, children or no children."

"Section 74, chapter 3, of the statute allowing said award to the widow, says it shall be her sole and exclusive property forever, and it applies to any widow. She need not have any family to get the award, but she is to receive more if she has a family; and the amount is graduated according to the size of the family; but the award, whatever may be the amount,

belongs to the widow as her sole and exclusive property." *McMahill v. Estate of McMahill*, 113 Ill. 467.

We contend that a widow entitled to an award can not be deprived of the same by an ante-nuptial contract unless fairly made, and fairly made means for a valuable consideration in lieu thereof. The love, affection or society of a husband, young or old, is no valuable compensation for the waiver thereof; and that or something equally intangible is the only consideration deducible from the evidence of appellant in this case as the consideration flowing from the said Freeman Martin to appellee in said contract.

Appellant's counsel contends that the marriage of Mr. Martin with Mrs. White alone constitutes a consideration for waiving her award or operates as an execution of the contract.

Marriage usually carries with it certain financial responsibilities; her counsel contends in effect that they are avoided in this case, and for nothing, or without valuable consideration; and says that the same objection might have been made to many ante-nuptial contracts, without citing a single authority; and that in the face of the authorities that say it is against the policy of the law to allow an ante-nuptial agreement to defeat the widow's award, unless there is a full and adequate compensation for the same. Chap. 30, Secs. 70, 74, 75 and 76 R. S.; *Phelps v. Phelps*, 72 Ill. 545; *McGee v. McGee*, 91 Ill. 548; *McMahill v. McMahill*, 105 Ill. 596; *Strawn v. Strawn*, 53 Ill. 263; *Weaver v. Weaver*, 109 Ill. 225.

The only cases cited by the appellant that have any direct relation to the widow's award are *McMahill v. McMahill*, 113 Ill. 401, and *Spencer v. Bordman*, 118 Ill. 353-358, and the contracts there passed upon or adjudicated both provide for a money consideration in lieu of the award, which sums in lieu thereof the parties entitled to accepted after the awards had accrued under the statute, so that no cases relied upon by the appellant have any application to the case at bar. Upon appellant's hypothesis appellee contends that the language of the contract in this case does not cover the widow's award; that the term "support" used in the contract can not be made to mean an award which did not come into existence until the death of Martin; that the contract was at best only executory

and might be repudiated by her. *Weaver v. Weaver*, 109 Ill. 234.

An ante-nuptial contract, to be binding on the widow, must be fair and just, and it must affirmatively appear that no advantage was taken of the weaker party at the time of the execution. *Rockafellow v. Newcomb*, 57 Ill. 186; *Kline v. Kline*, 57 Pa. 186; *Shea v. Shea*, 1 Lawyer's Report, 422, Pa. case; *Tierman v. Reims*, 92 Pa. 248; *Ludwig's App.*, 101 Pa. 535.

C. B. SMITH, P. J. This is an appeal from the Circuit Court of Kane County. The object of this proceeding is to have the court construe an ante-nuptial, or, as it is called in the record, a "special marriage contract," between Freeman Martin and Hannah E. White, entered into and executed by them on the date of their marriage.

The following is a copy of the contract:

"A special marriage contract between Freeman Martin, of the first part, and Hannah E. White, of the second part. Thus: That if the said H. E. White should be removed by death before or at the same time of the said F. Martin, the said F. Martin does bind himself, his heirs, executors, administrators and assigns, that he will release all right of dower and all right of support or claim or interest of every kind or description to any part of said Hannah E. Martin's property thereafter owned by her at the time of our marriage, or accumulated from the same thereafter, forever. And it shall be right and lawful for her or her heirs, administrators, executors or assigns to take possession of all that remains of the above said property and dispose of the same independent of the party of the first part forever.

And also the said Hannah E. White, of the second part, does bind herself, her heirs, administrators, executors and assigns, that if said F. Martin should be removed by death before or at the same time of the said H. E. White, that she will release thereafter all right of dower and all right of support or claim or interest of every kind or description thereafter to any part of said Freeman Martin's property owned by him at the time of our marriage, or accumulated from the same, forever.

Edwards v. Martin.

And it shall be right and lawful for him or his heirs, executors, administrators or assigns to take possession of all that remains of the above said property and dispose of the same independent of the party of the second part, forever.

And under these conditions we, Hannah E. White and Freeman Martin, agree to be married hereafter.

In witness thereof we individually sign our names and affix our seals this 30th day of November, in the year of our Lord one thousand eight hundred and eighty-six.

FREEMAN MARTIN, [SEAL.]

HANNAH E. WHITE. [SEAL.]”

At the time of the execution of this contract Freeman Martin was a widower about sixty-five years of age, and had some five or six children by a former wife, and was possessed of an estate (chiefly in money) of the value of about \$7,700.

At the same time Hannah E. White was a widow of sixty-four years of age, having also children by her former husband, and also possessed of some property (a house and lot, among other things) in her own right. Immediately after this contract was signed the parties were married, and lived together until the death of Freeman Martin in December, 1887.

The widow waived her right to act as administratrix of her husband's estate, and Lydia Edwards, the appellant, was appointed. Appraisers were appointed, who appraised the chattel property and made the widow's award, affixing it at \$779.65. Appellee afterward made her relinquishment and selection, and selected \$9.65 of the property, and elected to take the remainder of \$770 in money.

The administratrix being in doubt about the right of the widow to this award under the terms of this marriage contract above set out, declined to pay it, and thereupon filed a petition in the County Court, setting up the contract and asking to have the court construe it and to determine whether under its terms appellee was entitled to the widow's award. Appellee answered the petition and admitted the execution of the contract and the marriage, Freeman Martin's death, her award and selection, etc., but makes a very feeble effort to

avoid the force and effect of the contract, by averring in her answer "that on the same day, and before the marriage ceremony was performed, the said Freeman Martin presented a contract to her that had been prepared by him, or some one in his employ prior to that time, for her signature; that without examining the contract, and not knowing prior to that time what the terms of the contract were, and under the excitement of the occasion, she signed the contract." She further avers that she did not intend to release her widow's award and that she is advised that the contract could not have the effect to take from her the widow's award under the statute. There were no children born of this marriage.

The case was heard before the County Court, where the award was allowed to stand, and upon appeal to the Circuit Court the order of the County Court was affirmed, and appellant now presents her further appeal to this court and insists the Circuit Court erred in construing this contract.

On the trial in the Circuit Court there was no proof offered in support of the answer showing that any fraud or advantage had been taken by appellee in the execution of the contract or that she did not fully understand it and know its contents when she signed it. Counsel for appellee, however, insist that inasmuch as this answer was sworn to it must have the same effect as evidence as a sworn answer in a chancery proceeding.

But we can not concur in this view. This proceeding was in no sense a proceeding in chancery, where the answer could have the effect of evidence, but even if it could it would not aid appellee, for she does not say in her answer that she did not know the contents of the contract when she in fact signed it.

The only thing before us, then, is to determine whether by the terms of the contract appellee waived any and all right to any portion of her husband's estate. We think there can be but one possible answer to this question, and that is that she did waive all interest in her husband's estate, and upon a sufficient consideration. Marriage itself is a sufficient consideration for an ante-nuptial contract fairly and understandingly entered into. But in addition to that there was the

additional consideration moving to both contracting parties of mutual relinquishment of all interest in each other's estate.

What the effect of this kind of a contract would have been upon the right of the widow to her award in case there had been children born of the marriage, and who in that event would have had an interest in the widow's award, as being for the benefit of the family, under the statute, we express no opinion, since that kind of a question is not presented in this record. Here no rights are involved except those of the widow herself, and we entertain no doubt about her right to contract against such claims by an ante-nuptial agreement, where no fraud, collusion, overreaching, or advantage taken, is shown by the proof. *Barth v. Lines*, 118 Ill. 374; *McGee v. McGee*, 91 Ill. 548; *McMahill v. McMahon*, 113 Ill. 461; *Spencer v. Boardman*, 118 Ill. 553.

This class of contracts, however, should always be carefully scrutinized and watched by the court because they are frequently made under circumstances favorable to the stronger party, and under circumstances where the affections or dependent condition of the weaker party are liable to get the better of her judgment, and she is induced thereby to enter into contracts contrary to public policy, or to accept terms that are unjust and unconscionable.

In the case at bar, however, we find nothing to show any overreaching or advantage taken of appellee in the execution of the contract. It is clear to us from the proofs that she understood that it deprived her of everything belonging to her husband at his death, for she then offered to her husband's sons and heirs every particle of property she had received of him, as well as small articles of household goods which had been bought for the house while they were married, and in so doing she showed a much more commendable and worthy spirit than did the heirs, who were anxious and willing and did take from her the uttermost penny she had received through her husband, save a few pounds of coal and some vegetables in the cellar.

We are of opinion that the widow was not entitled to the award under this contract and that in allowing it the court

erred, and for that error the judgment is reversed and cause remanded.

Appellee has filed an amended abstract, and asks that the cost be taxed against appellant. This motion will be dismissed. We think there was no very urgent necessity for the amended abstract.

Reversed and remanded.

TOWN OF SHELDON

V.

GEORGE BURRY AND WILLIAM BURRY.

39 154
76 640

Attorney and Client — Fees — Recovery of Evidence — Deposition — Instructions.

1. Objections to the introduction of certain evidence in a given case can not be primarily made herein.

2. An objection to a deposition which could be removed or obviated by a new examination or a re-examination of the deponent, can not be considered after the case is called for trial.

3. In an action brought by attorneys to recover from a municipality for fees earned and disbursements made in certain suits, this court declines, in view of the evidence, to interfere with the verdict for the plaintiffs.

[Opinion filed May 21, 1891.]

IN ERROR to the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. KAY, EUANS & KAY, for plaintiff in error.

Messrs. HARRIS & HOOPER, for defendants in error.

UPTON, J. This suit was in assumpsit. The declaration contained the common counts only, with affidavit of merits, to which the general issue was interposed, with affidavit of meritorious defense.

The suit was instituted to recover from plaintiff in error attorneys' fees and claimed disbursements in the defense and

Town of Sheldon v. Burry.

prosecution of certain suits brought in the United States Circuit Court for the Northern District of Illinois by the holders of certain bonds issued by the plaintiff in error in aid of the construction of the Chicago, Danville & Vincennes Railroad, originally amounting in the aggregate to \$25,000, and for professional services claimed to have been rendered by defendants in error in drafting various and several bills in equity to restrain the collection of said bonds in the Federal and State Courts in the States of Maine, New York and Illinois. Defendants in error also claimed fees and compensation for obtaining, as claimed, a compromise and settlement of about \$40,000 of such bonded indebtedness of plaintiff in error for the amount of \$2,545.34, or about ten per cent of the face or par value thereof.

The amended and original bills of particulars filed by defendants in error claimed as due from plaintiff in error \$7,610.45, over and above discounts or set-offs thereto.

The claimed services extended over a period of three years and eight months, and the moneys claimed to have been disbursed by defendants in error was \$110.45. Upon this claimed account defendants in error had received to apply thereon the sum of \$1,500 at the commencement of this suit. In the Circuit Court a trial was had with a jury, and a verdict found for defendants in error for \$4,000, upon which, after overruling a motion for a new trial, judgment was rendered in the trial court, to which plaintiff in error excepted; to reverse which judgment this writ of error was sued out.

It appears from the evidence in this record that defendants in error were at first employed by plaintiff in error in the litigation referred to under a special contract as to fees and compensation in the trial of one suit only, the trial of which, being thereafter abandoned and an entirely different method of procedure in regard to that litigation being adopted by plaintiff in error, the defendants in error were employed on a general retainer, as they contend, to protect the interests of plaintiff in error in whatever litigation might arise in an attempt by the holders of the said bonds to

enforce collection thereof, and that the first retainer under such stipulated compensation for service in that regard was abandoned by the act and direction of plaintiff in error. Defendants in error contended that no specific compensation was ever agreed upon, or sought to be agreed upon, by either party to this litigation, as to the amount of compensation defendants in error should receive for the services rendered or to be rendered in that behalf, and hence they are entitled to receive what the same were reasonably worth.

In this contention the jury found for the defendants in error, and after careful examination and study of this record, we are unable to say that the jury were not fully warranted in so finding. This was entirely a question of fact for the jury, and unless some error in the rulings of the trial courts prejudicial to the plaintiffs in error intervened to produce the result, we can not interfere.

Objection is made by plaintiff in error to the action of the trial court in the overruling of certain objections made to certain questions and the answers thereto contained in the depositions of William Burry, Thomas S. McClelland, W. S. Ewing, J. S. Cooper, H. S. Munroe and Thomas Bates, attorneys. The objection to the deposition of William Burry now made is, in substance, that he was allowed to state the whole history of the litigation from the time the defendants in error became connected therewith until its close.

There does not appear to have been any such objection made to this evidence in the trial court by plaintiffs in error. It is too late to raise it here for the first time; besides, we perceive no valid objection to Burry stating all the facts and circumstances under which the claimed service was rendered, and the nature, amount and value thereof. The objection to the other depositions above named now interposed is, that the evidence of these attorneys therein contained as to the value of defendants in error's services, in fact covered the period of time when the fees and compensation of defendants in error were fixed by special agreement and did not call for the usual and customary fees for such services.

The objection we can not regard as well taken, for several

reasons; in the first place the jury have virtually found that no special agreement existed; that the one first made, for the reasons before stated, was abrogated and abandoned, and the evidence establishes that fact beyond question, as we think. Secondly, there was no objection specifically upon the ground first above mentioned taken in the trial court, nor motion made to suppress the deposition or any part thereof before the trial. If such objection had been taken in the proper way and in apt time, the claimed defects might have been obviated, if in fact any such defects there were. It can not be made here for the first time and rendered availing. There was no objection made to this testimony at the time it was taken and no cross-examination of either witnesses upon that subject shown by the record before us, and in regard to the value of the services rendered which are sought to be established by the evidence contained in the depositions complained of, we think the objections are not well taken in fact, and that the questions and answers are not in point of fact objectionable, as claimed by plaintiff in error.

The rule is well established that an objection to a deposition which could be removed or obviated by a new examination or a re-examination of the deponent can not be considered after the case is called for trial. *Kassing v. Mortimer*, 80 Ill. 602; *Wilson S. M. Co. v. Lewis*, 10 Ill. App. 191.

The issue being the reasonable value of defendants in error's service to plaintiff in error, rendered the questions and answers complained of in the depositions not objectionable, and the Circuit Court rightfully so held, as we think.

We think the second, third, sixth, eighth and ninth instructions asked and given to the jury were proper and substantially covered the case as established by the evidence. We also think that the refused instructions and those modified were properly so refused and modified and there is no error in the ruling of the Circuit Court in the admission or rejection of evidence on the trial, apparent to us by the record, and the judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

CHARLES RUSSELL

v.

B. F. THOMAS.

Practice—Rule 7 of Circuit Court—Service of Stallion—Recovery for.

1. In an action brought to recover for the service of a stallion, this court declines, in view of the evidence, to grant the motion of plaintiff to strike from the record defendant's bill of exceptions, the ground thereof being the alleged breach of a rule of the Circuit Court, or to interfere with the judgment for the plaintiff.

2. In view of rule 7 of the Circuit Court, five days notice having been given, the only requirement is that the opposite party must have the proposed bill of exceptions, or a copy, four days before presentation; and a proper construction of the rule does not require the copy or bill of exceptions to be presented at the same time that the notice is given.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. HARRIS & HOOPER, for appellant.

Mr. C. W. RAYMOND, for appellee.

LACEY, J. The appellee moved the court to strike the appellant's bill of exceptions from the record, and this motion was reserved by us to the hearing.

The grounds of the motion are as follows: 1. The rules of the Circuit Court were violated by appellant in that he failed to give appellee or his counsel five days notice of the time and place of the presentation of the bill of exceptions to the judge. 2. That the same bill of exceptions presented to appellee's counsel, when, or the next day after the notice, was not the same as was afterward signed by the judge, hence the failure to comply with the rule.

Rule 7 of the court is as follows, as far as applies to the matter in hand, viz.: "In case the court shall extend the time

for preparing and presenting for signature a bill of exceptions to a day in vacation, on or before which a bill of exceptions may be presented for the signature of the judge, it shall be the duty of the party preparing such bill of exceptions to give the opposite party five days notice of the time and place of presenting such bill of exceptions, and he shall, at the time, leave with the opposite party a copy of the proposed bill of exceptions, or shall allow the opposite party to take the original draft of such bill and retain the same for four days for examination, and no bill of exceptions shall be signed in vacation without satisfactory proof of such service of notice and copy," etc.

We think the objections taken are not sustainable. The five days notice was given, and as we interpret the rule, the only requirement is that the opposite party must have the proposed bill of exceptions, or a copy, four days before presentation; and a proper construction of the rule does not require the copy or bill of exceptions to be presented at the same time that the notice is given. The bill of exceptions, as proposed, was delivered to appellee's counsel the next day after the notice and in time to fill the four days requirement. It is claimed that the exact bill of exceptions as presented was not the same as was finally signed by the judge. It is not pointed out wherein it differs, except that the one signed was the reporter's notes of the evidence and was longer than the one first presented. This may be, and it may have contained much that was immaterial, as most reporters' notes do. But we see nothing in the facts that would deprive the bill of exceptions first presented from being considered, as the rule states, the "proposed bill." A proposed bill was presented and we see no reason to doubt that it was in good faith, although it may not have been an exact copy of the one finally signed. The motion is overruled.

Opinion on the Merits of the Case.

This was a claim sued on before a justice and afterward appealed to the Circuit Court, by appellee to recover for the service of his gray stallion to appellant's mare in the spring

of 1888, as claimed, for \$15. The verdict resulted in favor of appellee for the amount and judgment was rendered in the Circuit Court therefor. There seems to have been on the trial in the court below but one point of dispute, *i. e.*, whether the appellee agreed to allow the appellant, in case the mare became with foal and it died, to breed the mare back free of charge. The appellee based his claims on the grounds that the mare was bred to the horse without any special contract as to the price and the terms, and that the terms were \$15 to insure a foal; that the mare became with foal from the service of the horse and that he had a right to recover. Appellant claimed a special contract that the service was to be \$15 to insure his mare with foal, and in case the colt should die he had the privilege of again breeding his mare. So it will be seen that there was no dispute except as to the rebreeding in case the colt should not live. The appellant insists that the colt died, which appears to be undisputed from the evidence, and he also insists that the appellee sold his gray horse and therefore he could not breed again, and therefore is released from payment. We are inclined to think that the appellee's right to recover is made out at least *prima facie*, when he has shown that the mare was with foal, which he did, and if the appellant was entitled to recoup the value of the reservice he must show a failure to comply with such requirements on the part of appellee. There is no evidence that the reservice was to be a warranty. It was simply a privilege or an option appellant had and he might exercise it or not as he chose. If he never exercised his privilege or asked to have it granted to him he could not insist on any rebate of appellee's charge. We find no evidence in the record that the appellee, even if such a condition is made out by the evidence, was ever put in default by appellant.

In the first place there is no evidence in the record to show when the horse was sold, except that he was sold some time before July or August, 1889. Appellant testifies that he was at the sale, but he does not state when the sale took place. Thomas says he asked appellant in August, 1889, why he didn't bring his mare back, and appellant replied "the mare had a

Russell v. Thomas.

hard time and he did not want to breed her," and he had bred all of his mares, and "you (appellee) have sold the horse." Appellant himself testifies, "at the time we had the talk in July he offered me the black horse (that is to let him breed to him). I knew the gray horse was gone and we had bred all our mares. I never told him I would not breed at the proper time, if he had the horse." This is substantially all the evidence and the question of breeding back. The appellant failed to show to the jury that he had not bred his mares before the horse was sold, or that he wanted to or would have bred the mare to the gray horse even if appellee had not sold him. He made no tender of her prior to the time he had bred his mare to another horse. If he had done so how could he know that appellee could not have complied with this supposed condition, even if he had parted with the horse? There was no evidence that appellee was ever put in default even on the supposed condition. So we think the verdict was right without reference to the instructions.

The appellant complains of the fifth instruction in that the court told the jury that "the defendant was bound to pay for the service of plaintiff's horse according to the terms on which said horse was at the time stood." This as given, was correct, as there was no disagreement as to the usual terms and what appellant insisted the contract was, except as to the privilege of rebreeding the mare. The court might have submitted the hypotheses of the appellant's supposed recoupment. But as there was no evidence on which to base it, it was not necessary. Besides, if the appellant had desired such questions submitted he should have presented a properly drawn instrument on the point. What has been said disposes of all objections as to the admissibility of evidence and other like objections. The judgment is affirmed.

Judgment affirmed.

THE PEOPLE, EX REL.,

V.

IRA W. DAVIS ET AL.

Highways—Refusal of Commissioners to Act upon Petition—Mandamus—Evidence—Practice.

1. Highway commissioners may properly refuse to entertain a petition duly filed touching the location of a road, the real object thereof being to locate a disputed boundary line between land owners.

2. A mandamus will not be awarded unless the petition therefor shows a clear right to have that done which is the basis of the request.

3. Replying to an answer operates to waive the right to claim that the matters therein contained are immaterial; to raise that point, a plaintiff should stand by his demurrer thereto, and not take issue.

[Opinion filed May 21, 1891.]

IN ERROR to the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. GRIER & STEWART and C. A. McLOUGHLIN, for plaintiffs in error.

Messrs. KIRKPATRICK & ALEXANDER, for defendants in error.

C. B. SMITH, P. J. This was a petition for a peremptory writ of mandamus to compel defendants in error, who were highway commissioners, to receive and act upon a certain petition asking them to lay out a road on what was called in the petition "the Gordon line."

The commissioners refused to act upon the petition.

The cause was heard by the court below, and upon the hearing the writ was refused. The relators bring the record here on writ of error. The petition alleged that in 1859 a certain road was surveyed across the township by one Gordon, the county surveyor, and that it was afterward laid out and opened across the township, with the exception of one-half

mile, at the west end, and that it was laid out on this line surveyed by Gordon, except as to the half mile, and that as to that half mile it was found that a Mr. Wood, who owned the land, had, at the time of this survey, a fence inclosing in his field this half mile of the road, and that he obtained leave of the commissioners to make a jog in the road four rods to the northward and thence west along his fence to the west side of the township until such time as he, Wood, could move his fence, and allow the road to pass on straight to the west line of the township on the "Gordon line." The petition then alleges that Wood never moved his fence nor straightened the road, but that it has run in the same place since 1859, with the jog of four rods to the north, up to this time. The pretended purpose of this petition was to straighten the road and run it through to the west line of the township upon the "Gordon" line as called for in the petition.

We are satisfied from a careful examination of this record that the defendants were justified in refusing to entertain this petition.

It is apparent from the evidence that what is called the "Gordon line" is a disputed line, and that the real purpose of these petitioners is to get the highway commissioners to engage in a lawsuit and settle the location of disputed boundary lines between land owners, under the guise and pretense of locating a road.

These commissioners insist that the road is already on the "Gordon line," and that it was an open, palpable fact known to them, and that the road had been there and traveled by the public, and so known to everybody in the township, for thirty years, and they insist that it was not their duty to entertain a petition to locate a public highway on the "Gordon line" when they all knew, as a matter of fact, that the road was already on the "Gordon line."

Had the petition presented anything for them to determine which was not self-evident to them, and where they could see that the real purpose was to locate a road, then it would have been their duty to have received and acted upon the

petition. But whatever view we might entertain as to the duty of the commissioners when this was first presented we are now satisfied from the evidence heard before the Circuit Court that they were justified in not acting on the petition. It is uncertain where this "Gordon line" is, and we are now of opinion that the commissioners have such actual and personal knowledge of the place where Gordon ran his line, and that the road was there on the line, that they were justified in refusing to entertain the petition.

The plaintiffs in error, by replying to the answer, have waived the right to now claim that the matters there alleged were immaterial. To have presented that point they should have stood by the demurrer, instead of taking issue. The evidence also satisfies us that the real purpose of this petition was to locate a disputed boundary line between land owners.

Where commissioners are satisfied that that is the real object of the petition we think they are justified in refusing to entertain it. Unless the duty is clear the court will not award a mandamus to compel it. The petition must show a clear right to have the thing done they ask, and, failing in that, they must fail. We think they have not brought themselves within that rule in this case, and the judgment will be affirmed.

Judgment affirmed.

C. AULTMAN & Co.

V.

THOMAS S. SILVIS, SHERIFF.

Chattel Mortgages—Chap. 95, Starr & C. Ill. Stats., Act of 1877, Sec. 4, page 179—Replevin.

1. A mortgagor has a right to secure a debt not maturing in two years with a chattel mortgage for the full period of two years.

2. A creditor and mortgagee may declare his whole debt due, in advance of the time named in the note, in case of the seizure of the mortgaged goods by another, or in case of danger of losing his security, the mortgage containing a provision to that end.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Rock Island County;
the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. WILLIAM JACKSON and E. E. PARMENTER, for appellant.

To understand the chattel mortgage act correctly its purpose must be considered. No legislation is necessary to make a chattel mortgage valid between the parties. Neither the common law nor the statute forbids or prevents parties mortgaging their property when it is not done fraudulently.

The right to dispose of property by mortgage, pledge or other lawful means is but the exercise of that right of dominion and ownership that the citizen has over that which he possesses.

At common law a mortgage of personal property might be verbal, no writing being required. Jones on Chattel Mortgages, page 2, Sec. 2.

At common law a pledge or mortgage of personal property was not valid as to third persons or creditors unless possession of the property was transferred to the mortgagee or pledgee. This is a fundamental rule of the law that needs no argument. To avoid this legal requirement, and to enable the debtor to enjoy the use of his property while it may be mortgaged, the chattel mortgage act was passed.

“The most common object of such a mortgage is to enable the mortgagor to give security on the goods, and yet for the time being to retain the custody and use of them.” Jones on Mortgages, Sec. 236.

“Registration dispenses with delivery and possession.” Sec. 236.

A chattel mortgage not recorded or acknowledged is binding between parties. Gregg v. Sanford, 24 Ill. 17; Forest v. Tinkham, 29 Ill. 141; McDowell v. Stewart, 83 Ill. 538.

To understand the meaning of the chattel mortgage act, under which appellee claims the mortgage in controversy is void, we refer to the act respecting chattel mortgages (Rev. Laws 1845, Chap. 20) which preceded it. It provides:

“Any mortgage of personal property so certified shall be admitted to record by the recorder of the county in which the mortgagor shall reside, at the time when the same is made, acknowledged and recorded, and shall thereupon, if *bona fide*, be good and valid from the time it is so recorded for a space of time not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in possession of the mortgagor.” Reed v. Eames, 19 Ill. 594; Cass v. Perkins, 23 Ill. 326.

Under the act of 1845 the mortgagor could hold possession of the mortgaged property for two years, yet not for that time if the debt matured before. But in Reed v. Eames the court says: “Had the mortgage in this case provided that the possession of the chattels should remain with the mortgagor two years and not become absolute on default, there would be no doubt or difficulty in the case; but it provides the contrary—that it shall be absolute on maturity of the note and default made.”

Under the act of 1845 this question was presented in the case of Cook v. Thayer, 11 Ill. 617.

A mortgage was executed to secure a note payable in three years. The mortgage authorized the mortgagor to retain possession of the mortgaged property until default be made. It was claimed that this provision made the mortgage void; that the law only allowed the mortgage to run two years. But in this case it appears that the mortgagee took possession of the mortgaged property within two years. The court held the mortgage to be valid. In this case (Cook v. Thayer) the court says :

“The true meaning of the statute is, that a mortgage on personal property, duly acknowledged and recorded, and containing a provision that the property may continue in the possession of the mortgagor, shall, if made in good faith and to secure an honest debt, be good and valid against creditors and purchasers, for the space of two years after the same is recorded, and not that a mortgage which has a longer period to run is without the protection of the statute altogether. It continues valid and operative for two years, whether the

debt which it is designed to secure then becomes due or not. At the expiration of two years it ceases to be valid as against creditors and purchasers unless the possession of the property is transferred to the mortgagee."

This case has never been overruled so far as we know. It is not against the policy of the law, nor does it violate any legal principle, that a debtor should have the benefit of the two years' provision in a case where his debt runs longer than that period.

The law of 1845, as shown by the cases referred to, was applied as follows:

First. A mortgage of personal property was good for two years from the recording of the mortgage.

Second. Where the mortgage did not provide for the lien to continue for two years, the lien did not extend beyond the maturity of the debt.

Third. Where the mortgage was given to secure a debt that had a longer period to run than two years, the mortgage provision allowing the property to remain in the mortgagor's possession was good for two years; then it ceased to be a valid lien as against third persons, unless the mortgagee took possession of the property.

If the case now before your honors had to be decided under the law of 1845 there could be no controversy. We insist that, under the act of 1874, amended in 1887, there can be no contention when the law is correctly interpreted.

Statutes must be interpreted according to the intent and meaning, and not always according to the letter. When it becomes necessary to reject one or two words in a statute and to substitute another, to give force to the meaning of the law, it should be that which best effectuates the legislative intention; its words may be enlarged or restricted according to its true intent. *Reinecke v. People*, 15 Ill. App. 245, and cases there cited.

"It is one of the canons of construction, that the real intention of the Legislature, when actually ascertained, will prevail, and that for the purpose of such ascertainment the whole of the statute, the law existing prior to its passage, and the mischief to be remedied will be considered.

"It is also a rule that such construction will be avoided as would lead to palpable injustice and absurdity." County of Clark v. Bollman, 15 Ill. App. 281.

The interpretation contended for by counsel for appellee is narrow, partial and unfair.

A person who owes a debt that matures within two years can use his personal property in his business for the purpose of security. He can have the use of the property during the existence of the debt and enjoy all the benefits intended to be enjoyed by debtors under the chattel mortgage law. Whereas another debtor, equally meritorious and needy, whose debt does not mature within two years, under the construction contended for by appellee, can not use his personal property for security, and thus creditors and debtors of this class are alike excluded from the privileges of the law—a privilege as valuable to them as those of the first class. Property is valuable to the citizen in proportion as he can use it for the purpose of his business. The use of property for the purpose of security is a valuable privilege, which the citizen would not be denied except in cases where the public good or public policy would be promoted.

Messrs. SWEENEY & WALKER, for appellee.

Statutes relating to chattel mortgages, where the property is allowed to remain in the possession of the mortgagor, are in derogation of the common law, and hence are always strictly construed; and unless the mortgage is executed in every part, strictly in conformity with the statute, it is universally held to be *void* as against creditors. In other words, while *such* mortgages are allowed and permitted, they are not regarded with favor by the courts, and for the very good reason that *personal* property—the easiest to be reached by a creditor, and all that can be reached for small claims—is thus put beyond the reach of the general creditors; and also for the reason that this class of property is usually selected by the debtor to carry out a fraudulent purpose, and to hinder and delay his creditors. So well is this understood that in some States, such as Nevada and Washington, an affidavit is

required to be filed with the mortgage in the *first* instance, stating that "it is made in *good faith*, for an actual debt, and was not made to hinder, delay or defraud any creditor of the mortgagor;" and we think, without exception, such an affidavit must always be filed in case of an extension. When a mortgagee *fails* or *neglects* to see that *every step* required by the statute is complied with, his mortgage is void *ab initio*, and creditors may take the property to satisfy their debts, and are never chargeable with bad faith for so doing. The courts universally approve of such taking, and furnish the mortgagee no redress. Porter v. Dement, 35 Ill. 478-80; McDowell v. Stewart, 83 Ill. 538-40; Frank v. Miner, 50 Ill. 444-8; Sage v. Browning, 51 Ill. 217-9; Blatchford v. Boyden, 122 Ill. 657; Long v. Cockern, 128 Ill. 29; Jenney v. Jackson, 6 Ill. App. 32-6.

A simple reading of the statute shows that only a mortgage to secure a debt *until maturity* was in the mind of the Legislature. No other is referred to. Hence, at best, appellant's mortgage could only be held valid as a security for the payment of the first two notes, the last of which became due December 1, 1888, both of which had been paid long before the levy. Appellee levied his execution and took the property August 1, 1889, by virtue of the execution issued on that day.

Upon the maturity of these notes the mortgage, if valid in the first instance, thereupon ceased and expired as a *security*. There was no other note maturing within the two years, nor for the two months thereafter; hence it was *impossible* to have the mortgage extended under the amendment of 1887 (which we shall more fully discuss hereafter) by filing an affidavit. It would be impossible to file an affidavit within the two years from filing for record, and within thirty days of the maturity of any unpaid note. There was no note to mature within that time. Therefore, as any *possible* security, the mortgage lien, if ever existing, had ceased and expired before the property was taken by appellee.

It can not be, as counsel urge, that a mortgage can be valid as against creditors, under the law of 1874, *after* the debt

it can *legally* secure has been paid, and the mortgagee still retain possession of the property. *Arnold v. Stock*, 81 Ill. 407-10; *Blatchford v. Boyden*, 122 Ill. 657; *Eagle v. Rohrheimer*, 21 Ill. App. 518.

The debt is the *principal* and the mortgage only the incident; and upon payment of the debt the mortgage is satisfied *eo instanti*, and is thereafter void. This has been so often decided that it is unnecessary to cite authority in its support.

C. B. SMITH, P. J. This was an action in replevin, begun by appellant against appellee, as sheriff of Rock Island County, to recover the possession of the following personal property: A new model separator with the truck stacker and fixtures and a ten-horse Canton Monitor engine. The plaintiff filed the usual declaration, and the defendant interposed all the usual pleas in replevin.

Issues were joined, and a trial before the court without a jury resulted in a verdict and judgment for appellee. The plaintiff prosecutes this appeal and alleges that the finding and judgment of the Circuit Court was erroneous. The case was tried upon an agreed state of facts, which was as follows, (except as we have abbreviated it by leaving out unimportant matters), viz.:

The following are the agreed facts:

"First. That the property replevied was on the first day of August, A. D. 1887, the property of said James M. Davis, and he remained in possession thereof until the same was levied on and taken from him by virtue of the execution hereinafter named on August 1, 1889.

"Second. That on the first day of August, 1887, said James M. Davis was indebted to said C. Aultman & Co. (an incorporated company under the general laws of the State of Ohio), of Canton, Stark County, Ohio, in the sum of \$1,941.25; to secure the payment of said sum of money, said James M. Davis made and executed five promissory notes payable to the order of said C. Aultman & Co., dated August 1, 1887, and described as follows, to wit: One for \$250, payable December 1, 1887; one for \$425, payable December 1, 1888; one for \$425, payable December 1, 1889; one for \$425, payable Decem-

ber 1, 1890; one for \$416.25, payable December 1, 1891; which notes drew interest at the rate of eight per cent per annum from date until maturity, and eight per cent per annum from maturity until paid; that the first two notes above mentioned have been fully paid; that the remaining three notes, together with the interest, at the time of the commencement of this suit were owned by the said C. Aultman & Co. and unpaid; that on the first day of August, 1887, the said James M. Davis made and executed a certain instrument marked 'Chattel mortgage' on the property in controversy; that the following is a correct copy of said three unpaid notes and said instrument, and the certificate of acknowledging and recording thereon."

Here follows copies of the three notes above referred to. for the amounts and due as above stated, each signed by J. M. Davis and W. H. Davis.

Then follows in the stipulation of the copy of the chattel mortgage upon the same property above described in the usual form and bearing the same date with notes.

The following is one of the clauses in the chattel mortgage included in the stipulation:

"Provided, nevertheless, that if the said party of the first part, his heirs, executors, administrators and assigns, shall well and truly pay or caused to be paid unto the said party of the second part or their successors and assigns the sum of nineteen hundred and forty-one and 25-100ths dollars with interest, according to the conditions of five certain promissory notes, signed by the said party of the first part, and payable to the order of C. Aultman & Co., dated August 1, 1887, and described as follows, to wit: One for two hundred and fifty dollars, payable December 1, 1887; one for four hundred and twenty-five dollars, payable December 1, 1888; one for four hundred and twenty-five dollars, payable December 1, 1889; one for four hundred and twenty-five dollars, payable December 1, 1890; one for four hundred and sixteen 25-100ths dollars, payable December 1, 1891; with interest at the rate of 8 per cent per annum from date until maturity, and 8 per cent per annum from maturity until paid; then

and from thenceforth these presents and everything therein contained shall be void."

And the following is another clause taken from the said mortgage, viz.: * * * "or if the same should be seized upon *mesne* or final process, had against the said party of the first part, then and in any or either of the aforesaid cases, all of said notes shall, at the option of the party of the second part, or their successors and assigns, without notice, become at once due and payable; and the party of the second part, or their successors and assigns, authorized agent or attorney, shall thereupon have the right to take immediate possession of said property, wherever it may be found."

We have copied only such parts of the mortgage in question as seem necessary to be referred to in the case before us.

The mortgage was properly acknowledged and recorded. The stipulation then continued as follows:

"Third. That in March, 1889, said James M. Davis was indebted to W. W. Elliott and H. B. Carpenter in the sum of \$669.25; that on March 6, 1889, the said Elliott and Carpenter recovered a judgment in due form and in all respects valid on said indebtedness against said James M. Davis, in the County Court of Rock Island, Ill., for said sum of \$669.25; that on the first day of August, 1889, an execution in due form, properly attested, was issued by the clerk of said court, under the seal of the court, on said judgment; that said execution was delivered to the defendant, said Thomas S. Silvis, sheriff of said Rock Island County, and was by him levied on the said property mentioned in the declaration and described in said instrument, on the first day of August, 1889.

"Fourth. That after the levy, plaintiff considered itself insecure and unsafe and feared diminution, removal or waste of the mortgage property for want of care; that by reason of said levy, and for the reasons stated above of insecurity, removal or waste, etc., plaintiff at once proceeded to obtain possession of said property, and did declare the whole amount of said three notes unpaid, due and payable, principal and interest, and thereupon, on the 23d day of August, A. D. 1889, while said goods were in the defendant's possession

under said levy, plaintiff made a demand for the possession of said property from defendant, which defendant refused to deliver to it, and thereupon this suit in replevin was brought; that the property in controversy exceeds the value of \$1,000, and at the time of the commencement of this suit said three notes were wholly unpaid."

It is herein agreed between the plaintiff and defendant in this cause that the only point of contention herein is as follows :

"Plaintiff herein claims the right to recover from defendant said mortgaged property so levied on, under and by virtue of the security of said mortgage conveyance; that less than two years had elapsed since said chattel mortgage deed was filed for record before the justice and in the office of the county recorder, and before said demand was made by plaintiff upon defendant, and the commencement of this suit; and that plaintiff did recover possession of the mortgaged property from defendant by this proceeding within said two years after such recording."

On the part of the defendant it is contended that the time between the filing of said instrument for record and the maturity of the entire debt and obligation mentioned in said mortgage exceeded the term of two years, contrary to the statute; and that by reason thereof said mortgage is insufficient to allow the plaintiff to recover, and invalid as against said execution creditors, Elliott and Carpenter.

It is further agreed that the court shall decide this case wholly on the contention of plaintiff and defendant, whether said instrument is or is not a valid chattel mortgage or sufficient to allow the plaintiff to recover herein. If the court holds that the said instrument is a valid chattel mortgage, or sufficient to allow the plaintiff to recover herein, as contended by the plaintiff, the finding shall be for the plaintiff. If the court holds that the instrument is void as a chattel mortgage or insufficient to allow the plaintiff to recover herein, as contended by defendant, the finding shall be for the defendant.

Both parties reserved the right to appeal from the judgment of the court.

It will be seen that under the stipulation and agreed state of facts above set out that but a single question is presented for our determination, viz., whether a chattel mortgage executed to secure notes not maturing or due within two years from the date of the mortgage, is a valid mortgage under our statute, for the period of two years. Under the agreement here, five notes were secured by this mortgage, three of them having more than two years to run before maturity after the date of the notes and the mortgage. The two notes falling due within two years had been paid and the mortgage no longer secured them, and could have no vitality as to them after they were paid.

The controversy in this case arises under the fourth section of Chap. 95, on Mortgages, Starr & C. Ill. Statutes, which reads :

“Such mortgage, trust deed or other conveyance of personal property, acknowledged as provided in this act, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded, or in case the mortgagor is not a resident of this State, then in the county where the property is situated and kept, and shall thereupon, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation, provided such time shall not exceed two years.”

We do not understand appellant to claim that this mortgage could protect the property or secure the debt as against creditors or purchasers, beyond the period of two years from its date, nor do we understand that any such effect could be given to it, without it being renewed as now provided by law under the act of 1887. We think a correct construction of the statute above quoted makes the limitation of two years apply to the mortgage lien and not to the debt secured by the mortgage. The subject of the entire section is the mortgage and not the debt, the thing the Legislature is providing for, and limiting the security of the mortgage.

It is clear, we think, that the Legislature intended to allow debtors to use their chattel property for security to any

creditor for a limited time only. This was for the purpose of enabling them to obtain credit, or to secure debts already incurred.

The policy of the law seems to be that debtors shall not be permitted to incumber their personal property for a greater length of time than two years, and if the debt secured shall not mature before that time then the security shall extend for the full period of two years. But it is contended that because of this limitation to the mortgage, that it amounts necessarily or by implication to a like limitation on the debt itself, and if the debt has more than two years to run, that it is therefore such a debt as is without the protection of the mortgage, and that such debt can not be secured by a chattel mortgage, even for a period of two years.

We do not think such a result follows our construction of the statute. We think it a matter of no importance how long the debt has to run before maturity, either in whole or in part, nor how large or small it may be. It may, notwithstanding, be secured for the full period of two years, and the property remain with the mortgagor for that time, provided it does not fall due before that time; but at the end of two years, if the debt is not due, or if due and the property not taken possession of by the mortgagee at the time it is due, then as to other creditors and purchasers the security of the mortgage closes, unless the same be renewed or extended as provided in Sec. 4, page 179, of the Act of 1887.

In the case of *Cook v. Thayer*, 11 Ill. 617, the Supreme Court construed the statute of 1845, containing provisions substantially like our present statute, so far as limiting the lien of chattel mortgages to two years is concerned. In that case the note had three years to run. The Supreme Court say: "The true meaning of the statute is that a mortgage on personal property duly acknowledged, if made in good faith, and to secure an honest debt, shall be good and valid against creditors and purchasers for the space of two years after the same is recorded, and not that a mortgage which has a longer period to run is without the protection of the statute altogether. It continues valid and operative for two

years, whether the debt which it is designed to secure then becomes due or not; at the end of two years it ceases to be valid as against creditors and purchasers, unless the possession of the property is transferred to the mortgagee."

And it would seem from the language of the Supreme Court in *Cook v. Thayer*, *supra*, that when a mortgage secured a debt which did not mature in two years, that for the purpose of making the security available, the mortgagee might take possession of the property at the end of two years, although the debt is not in fact due; but whether that right here existed we do not decide, but, however that may be, it is clear that the mortgagor has a right to secure a debt not maturing in two years with a chattel mortgage for the full period of two years. We find none of the cases cited by appellee in any wise inconsistent with this view, nor inconsistent with the rule announced in *Cook v. Thayer*.

We think this case clearly controls the one at bar. While the phraseology of the two statutes is not exactly alike, still we think there is no substantial difference so far as they both relate to the two years' limit of the mortgage. We think, though, that the statute now in force made this mortgage a good and valid lien for the notes not then due, and which would not be due on their face within the two years from the date and recording of the mortgage.

We think much confusion and misapprehension of the law governing the case at bar and similar cases reported results from a failure to make a distinction between the debt to be secured and the mortgage given to secure it. The whole purview of the chattel mortgage statute relates to the mortgage itself, and not to the debt, except to require that the debt shall be a real and honest debt. We see no reason in this statute for concluding that the Legislature intended to make any distinction between large or small creditors, or between those whose debts would mature within or after the expiration of two years, or that it was the intention to allow debtors to secure only debts which should mature within two years, and deny them the right to secure other debts not maturing within that time, although the security could not extend to

the full time of the debt and must stop at the end of two years. The great purpose and aim of the statute was to confer power on debtors to use their personal property to secure their honest debts (no matter what kind or when due) for the limited space of two years. This was supposed to be a valuable privilege enforced on both debtor and creditor.

But for reasons of public policy and to prevent needy debtors and grasping creditors from incumbering perishable and short-lived property, and to prevent undue favors to particular creditors to the hindrance and damage of others, the Legislature deemed it wise to limit the lifetime of that kind of security under any single mortgage to two years, and to a less time than that if the debt matured sooner.

But there is another ground upon which the plaintiff's right to recover seems clear to us. It will be seen by the stipulations above set out that the mortgage provides that in case the property should be seized on *mesne* or final process during the life of the mortgage then the mortgagee might declare the whole debt due and immediately take the property.

This he did, and upon doing so his right to immediate possession of the property became absolute.

By the right to declare the whole debt due reserved in the mortgage upon the happening of the event named, and by exercising that right and so declaring the debt due, the mortgagee thereupon removed out of the case. The whole ground or pretended right of appellee to hold the property under his execution, became thereupon *ipso facto*; the whole debt became due within two years, and there could no longer be any question about the mortgage covering and protecting the property.

This right of a creditor and mortgagee to declare his whole debt due in advance of the time named in the note in case of seizure of the goods by another, or in case of danger of losing his security, and to thereupon take the goods under his mortgage, has been repeatedly held by the Supreme Court to be the law and the right of the mortgagee. *Bailey v. Godfrey et al.*, 54 Ill. 507; *Lewis v. D'Arcy*, 71 Ill. 648; *Roy v. Goings*, 96 Ill. 361.

Under either view of the case we have discussed we think it clear that appellant was entitled to the possession of the goods described in the mortgage, and that the court erred in its finding and judgment to the contrary.

For that error judgment is reversed and remanded.

Reversed and remanded.

LACEY, J. I regard the mortgage as valid under the statute.

OLIVE R. VAN NOSTRAND

V.

CHARLES B. MEALAND, ASSIGNEE, ETC.

Insolvency—Claim of Wife of One Member of Firm—Loan.

This court holds as erroneous an order disallowing the claim of a married woman against an insolvent firm of which her husband was a member.

[Opinion filed May 21, 1891.]

APPEAL from the County Court of Kane County; the Hon. EDWARD C. LOVELL, Judge, presiding.

Messrs. SHERWOOD & JONES, for appellant.

Messrs. CLIFFORD & SMITH, BOTSFORD & WAYNE and JOHN A. RUSSELL, for appellee.

C. B. SMITH, P. J. On and prior to September 4, 1884, Edwin E. Balch and George Colie were doing business in Elgin under the firm name of Balch & Colie.

About the 5th. of September Balch sold his interest in the business to George Y. Van Nostrand for \$1,000, and he assumed the debts of the firm. Balch supposed at the time that Van Nostrand was buying the entire business and that Colie was also selling his interest, but this was a private understanding between Van Nostrand and Colie, that Colie was to remain in

Van Nostrand v. Mealand.

the business after they had gotten rid of Balch and that the new firm should be Van Nostrand & Colie.

Immediately after this arrangement was completed Van Nostrand took possession with Colie and at once went to his wife, the plaintiff in this case, and informed her that he wanted to borrow from her \$1,500 for himself and five hundred for the new firm of Van Nostrand & Colie. Mrs. Van Nostrand did not have the money, but in order to accommodate her husband and his new partner she sold a mortgage for \$1,000 and gave her husband the proceeds of it. He immediately paid Balch \$500 out of this loan and took the other five hundred and placed it to the credit of the new firm of Van Nostrand & Colie. This money was used by Van Nostrand & Colie in paying the debts of the firm. Again on the 25th of September George G. Van Nostrand borrowed from his wife \$200 for the use of the firm, and again on the 5th of October he borrowed from her \$50 for the firm.

All these sums of money were placed to the credit of the firm of Van Nostrand & Colie and were used by them in buying goods and paying bills.

The December following the firm of Van Nostrand & Colie failed and made an assignment to Charles B. Mealand for the benefit of their creditors.

Appellant, Mrs. Van Nostrand, filed and proved her claim against the firm for \$750, the amount loaned them, through her husband, but her claim was not allowed. From this order Mrs. Van Nostrand appeals to this court. We think the County Court erred in disallowing this claim. There is no proof in the record to show that Mrs. Van Nostrand had any knowledge of the agreement of her husband with Balch to pay all the debts of the firm when he bought into it. She was an entire stranger to that transaction and was not bound by it and it was not admissible in evidence against her. The money was loaned by her to the firm and used on the joint account of the firm in buying goods and paying debts with the knowledge and assent of both its members. Appellant was not bound to see what use the firm made of the loan. Even if she had known that her husband had agreed to pay the old

debts of the firm she might still loan the new firm money to be used by them as they saw fit.

But the evidence shows that as between George Van Nostrand and Colie the agreement on the part of Van Nostrand to pay all the debts of the firm was a mere ruse to get rid of Balch, and that it was then understood that Colie should remain in the firm as a silent partner, but in fact without any change as to his rights and liabilities in the firm. So that as between the members of the new firm Colie was not released from the debts of the old firm nor his relation to the assets or its debts at all changed.

Appellant loaned her money to the new firm in good faith and the firm used it to pay debts, for which they were both liable, and to buy goods, and we fail to see any reason why appellant should not be permitted to prove her claim against the assignee.

The judgment is reversed and the cause remanded.

Reversed and remanded.

JOSEPH H. JOHNSON

V.

JOHN C. STINGER.

39 180
78 375

Trespass—Evidence—New Trial.

1. In the absence of a defense, evidence in a suit of trespass *quare clausum fregit*, that the *locus in quo* has been in the undisputed possession of the plaintiff for over fifty years, and that defendant has encroached thereon by building a fence, doing no other damage, will warrant a recovery of at least nominal damages.

2. In the case presented, this court hold that the defendant has failed to show a good defense, and that the judgment in his favor can not stand.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Marshall County; the
HON. LAWRENCE W. JAMES, Judge, presiding.

Messrs. BARNES & BARNES, for appellant.

Messrs. EDWARDS & EVANS, for appellee.

LACEY, J. This was a suit of trespass *quare clausum fregit* by the appellant against appellee.

The former showed on the trial that the *locus in quo* had been in his undisputed possession for over fifty years and that appellee had encroached on such possession by putting a fence on it without authority, though doing no other damage to the property. This, unless some defense be shown, entitles appellant to recover at least nominal damages, which are alone claimed.

As we understand it, appellee claims that the declaration and pleadings narrow the question down to a supposed trespass on lot No. 12, and that he has shown that the trespass was not committed on lot 12 but on ground just west of it. We are unable to agree with him in this regard, as the possession of appellant was in the inclosure claimed by him for fifty years as being a part of lot 12, and we think under the evidence the *locus in quo* must be regarded as a part of lot 12. But we suppose the main defense is that the appellant can not maintain this action because he was not at the time of the building of the fence in the actual possession of the land but had surrendered it to his tenant, McKeal, to raise a crop of corn and tomatoes on about eight acres of the lot. We think McKeal, by the terms of the leasing, had not the exclusive possession of the lot, but had only the right to raise the crop and remove it, without other right, and especially he had no possession of the place where appellee built the fence complained of.

There appears to have been no defense to this action. It is insisted, however, that as the damages were only nominal, a new trial will not be awarded, and the case of *Comstock v. Brosseau*, 65 Ill. 39, and other like cases are cited.

That case is entirely different from this. There, only the mere possession of a person who claimed no interest in the land was involved, and if even in rightful possession, was a

trespasser and wrong-doer. There was no damage to his personal property. In this case the appellant was in the long and undisputed possession of the premises, claiming title. If this judgment is allowed to stand, his claim of possession may be destroyed and interrupted and his rightful title seriously embarrassed.

Seeing no defense to the action the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

WILLIAM O'LEARY
V.
STEPHEN BRADFORD.

Replevin—Goods in Possession of Another under Bill of Sale—Practice—Insufficient Abstract.

1. A purchaser of personal property, in order to acquire title thereto as against creditors and *bona fide* purchasers of the vendor without notice, must reduce the property purchased to possession before the rights of such creditors or purchasers attach thereto.

2. In the case presented, this court holds that the jury were justified in finding that defendant had actual notice of the rights of plaintiff to the property in question before the levy was made; that notice to the officer holding the writs was notice to the attaching creditors, and declines to interfere with the judgment for the plaintiff.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Marshall County; the Hon. LAWRENCE W. JAMES, Judge, presiding.

Messrs. H. C. PETTITT and BARNES & BARNES, for appellant.

Messrs. EDWARDS & EVANS, for appellee.

UPTON, J. It must be conceded that the abstract filed in this case is quite deficient, and falls far short of a compliance with the rules of this court.

It does not appear therefrom what, if any, errors or cross-

errors have been assigned upon the record for which a reversal of the judgment of the trial court is here sought.

From the briefs and arguments of counsel we learn that this was a suit in replevin brought in the Circuit Court of Marshall County by appellee, to recover from appellant one stallion, two mules, two hundred bushels of millet seed and one cider press and fixtures, as the goods and chattels of appellee, who claims the property by virtue of a bill of sale to him given on the 14th of March, 1890, by S. G. Bradford & Bro., as security and indemnity to him for the payment of about \$3,000 to various creditors of the above named firm, for which said indebtedness he had some time prior thereto become bound as security. That on the 18th of March, 1890, Clark & Sons caused an attachment to be issued in their favor against the goods and chattels of S. G. Bradford & Bro. for \$188.42, which was on the same day placed in appellant's hands, and by him levied upon the property in question. On the 20th of March following, Newman & Ullman sued out an attachment against the same defendants for \$71.10, which was on the day following its issue levied upon the same property by appellant as such constable and the property taken into the possession of appellant upon said attachments. Thereupon this suit was brought, as before stated, by appellee, and heard in the trial court with a jury. Upon that hearing appellee testified in substance that he was seventy-four years old; that on the 14th day of March, 1890, he got the property in question, and a bill of sale thereof was given him therefor; that he did not then remove it as he had no suitable place to keep it; that the consideration for such bill of sale was \$3,000, which he had paid to the creditors of S. G. Bradford & Bro. a short time prior to the execution of the bill of sale, upon a part of which indebtedness he was, prior thereto, surety for said firm; that he obtained the money to make such payment by a mortgage of his, the appellee's, farm; that prior to the levy he had advertised the property in question for sale, and was in person present at the place where the property was kept, before and at the time appellant came there to make the levy; and before the

levy was made, or the property was taken by appellant, appellee notified appellant that the same was his property; that appellee claimed it as his own under his bill of sale, and forbade appellant from taking it, and appellant replied that he knew all about his "bill of sale," that it was not good, made the levy and took the possession of the property under the levy. This conversation between appellant and appellee was flatly denied by the appellant in his testimony before the trial court. The jury, however, chose to credit appellee's testimony upon that contention, and returned their verdict finding the right of the property in controversy in appellee, and the trial court, after overruling a motion for a new trial, gave judgment thereon, from which this appeal is taken.

No question is made, or error claimed, of the proceedings in the trial court, in allowing or rejecting evidence, or giving, refusing or modifying instructions to the jury asked by either party.

The only points raised or discussed by appellant's counsel are, first, whether the appellee's possession of the property in question, as shown by the evidence, was sufficient to vest the title thereto in appellee, as against the creditors of S. G. Bradford & Bro. and the appellant, as such constable; second, if it was not, was the evidence sufficient to enable the constable to justify the taking upon the attachment writs as an officer *de jure*?

In the view we take of the case it will be needful only to examine the first of these points as stated.

The rule in this State is, that a purchaser of personal property in order to acquire title thereto as against creditors and *bona fide* purchasers of the vendor, *without notice*, must reduce the property purchased to possession before the rights of such creditors or purchasers attach thereto. *Huschle v. Morris*, 131 Ill. 593, and the cases therein cited.

It is clear, we think, that neither the attaching creditors nor the appellant holding the writs of attachment acquired any rights in or to the property in question until the actual levy of the attachment writs, and the jury have found the fact to be that appellant had actual notice of the rights of the appellee

Steel v. Shafer.

to the property before the levy was made, and in fact knew that appellee had the sale bill thereof, and was then in the possession thereof, and notice to the officer holding the writs was notice to the attaching creditors therein named; and we are entirely satisfied with that finding, and we think it was fully supported by the evidence.

This view renders it unnecessary so examine the other point made upon this contention, and the judgment of the Circuit Court is affirmed.

Judgment affirmed.

NICHOLAS L. STEEL
V.
CLAYTON E. SHAFER.

Trespass vi et Armis—Evidence—Instructions.

1. An instruction not based upon evidence introduced should be refused.

2. A party will not be allowed to put in evidence his own statements as to an affray, or his own statements as to his mental condition at the time thereof, made at a time subsequent to the occurrence.

3. A general objection to admitting in evidence a reply to an interrogatory in a deposition, a portion thereof only being proper evidence, can not be considered herein.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Ogle County; the Hon. WM. BROWN, Judge, presiding.

Messrs. E. F. DUTCHER and O'BRIEN & O'BRIEN, for appellant.

In no view of the case were the statements to Eakle admissible.

Even according to the few cases holding that declarations of a witness out of court may be admitted when offered by him in corroboration of his testimony under oath on the trial,

when it is sought to impeach him by proof of contradictory statements, the rule was never carried so far as to warrant the admission of such declarations to corroborate his sworn testimony where the adverse party had only sought to prove his case by introducing evidence of the admissions of the other party.

When the plaintiff attempts to prove his own case in the first instance by evidence of the defendant's admissions, there is no attempt at impeachment, and testimony by the defendant in defense showing the transaction in a different light from that shown by his admissions, does not make the admissions evidence of impeachment, nor authorize the defendant to prove his own declarations on other occasions corroborative of his sworn testimony.

It was only where a party testified and it was sought to impeach him by proof of contradictory statements made by him out of court, that he could prove his own statement in corroboration. In this case appellant proved appellee's admissions as part of his case, and not by way of impeachment. It was discretionary with a party, in defense, to testify or not.

In the note to 1 Greenl. on Ev., Sec. 229, it is said: "Nor can an admission be rebutted by evidence of contrary statements;" citing *Hunt v. Roylance*, 11 Cush. 117, 59 Amer. Dec. 140, where the question was whether Strobridge was a partner. Plaintiff proved his admissions that he was, and to rebut it he was permitted, against objection, to prove that on one occasion he had refused to sign a note, and gave as a reason that he was not a partner.

Bigelow, J., says: "He could explain and contradict any conversation or declaration that had first been proved against him, but beyond this he could not go. His own admissions, not offered in evidence against him, had no legal tendency to control the case proved on the other side.

"To show that a man denied being a member of a copartnership to A, to-day, does not prove or tend in any way to show that he did not admit that he was a member to B, yesterday. It is simply an admission in his own favor, having no bearing on the admission proved against him."

In *Jones v. State*, 13 Tex. 168, 62 Amer. Dec. 553, the court say: "The appellant asked the court to instruct the jury in effect that if a confession of the accused was proved to have been made at one time to one witness of the State and proved to have been denied at another time by another witness of the State, one would destroy the other, had both to be taken together. If this rule should be sustained it would allow the accused to make evidence in his own defense.

"The whole admission must be proved, both the favorable and unfavorable parts, but the rule does not extend to matters distinct from the admissions and contrary statements made at other times." 5 Amer. & Eng. Ency. of Law, 355.

The rule of exclusions is carried farther in *People v. Green*, 1 Park. Cr. Rep. 12: "Where a party has called a witness and proved by him a conversation with the opposite party, the party whose conversation has been proved can not, on cross-examination, prove a subsequent conversation between the party cross-examining and the witness two or three hours after, though it was upon the same subject as the first and explanatory of it."

And this is the decision in *Hatch v. Potter et ux.*, 2 Gilm. 729. See 2 Phil. on Ev., 4th Amer. Ed. 973, 974, and note to *Johnson v. Patterson*, 2 Hawks, 183; 11 Amer. Dec. 757.

The rule in a few of the States admitting such testimony to rebut impeaching testimony, is against the decided weight of authority and better reasoning, is disapproved by all text writers, and denied in our own State.

It was based upon a case in 1 Mod. 282, *Luttrell v. Regnell*, overruled in *R. v. Parker*, 3 Doug. 242. The courts of New York and Pennsylvania first followed the case in 1 Mod. but afterward adopted the rule, excluding such evidence except in the instances specified in *Stolp v. Blair*, 68 Ill. 544, as, where the witness is charged with testifying under the influence of some motive prompting a false statement, it may be shown he made a similar statement when the motive did not exist; or where it is charged his statement is a recent fabrication, it may be shown he gave a similar account before its effect and operation could have been foreseen, as in *Gates v. People*, 14 Ill. 434.

Further than this the rule does not go. 1 Greenl., Ev., Secs. 469, 229; Whart., Ev., 492; 2 Phil., Ev., 973, 964, 4th Amer. Ed., and p. 445; 1 Stark., Ev., 147; Whart., Cr. Ev., Sec. 492, and cases there cited; Robb v. Hackley, 23 Wend. 50, a leading case, afterward followed in Dudley v. Bowles, 24 Wend. 465, and in Reed v. N. Y. C. R. Co., 45 N. Y. 576; Gibbs v. Tinsley, 13 Vt. 208; Ellicott v. Pearl, 10 Pet. 412; Conrad v. Griffey, 11 How. 480, 490; Stolp v. Blair, 68 Ill. 541; Smith v. Stickney, 17 Barb. 489; Riely v. Vallandigham, 9 Mo. 819; State v. Kingsbury, 58 Me. 238; Judd v. Brentwood, 46 N. H. 430; Munson v. Hastings, 12 Vt. 348; Moore's Civil Justice, Sec. 1070; 17 Mich. 435; People v. Mead, 50 Mich. 228.

Prof. Greenleaf in Vol. 1, Sec. 469, says: "But evidence that he has on other occasions made statements similar to what he has testified to on the cause is not admissible. The cases, Cook v. Curtis, 6 H. & J. (Md.) 93; McAleer v. Howley, 35 Md. 439; Hendrickson v. Jones, 10 S. & R. 332; and Coffin v. Anderson, 4 Black (Ind.), 398, seemed to have been founded directly or evidently on the case of Lutterell v. Regnell, 1 Mod. 282, which long ago ceased to be authority in England;" citing R. v. Parker, 3 Doug. 242, and in the note: "Nor can an admission rebutted by evidence of contrary statements."

Henderson v. Jones, 10 S. & R. 332, was overruled in Craig v. Craig, 5 Rawle, 91, and Good v. Good, 7 Watts, 195.

In the note to Johnson v. Patterson, 2 Hawks, 183, S. C., 11 Amer. Dec. 757, the authorities are reviewed and the true doctrine announced, that such evidence is only admissible when it is charged that the testimony of the witness is a recent fabrication, and having its origin in some event powerfully affecting his interests, or in some change in his situation with reference to the transaction or to the parties, when it is admissible to rebut the imputation by proving declarations prior to such event or change, agreeing with what he now swears to be the truth.

And by "recent fabrication" is not meant that merely impeaching a witness by proving his prior declarations

contradictory of his testimony is an imputation of "recent fabrication," for this would abrogate the rule. *Id.*

By proof of recent fabrication is meant proof that the witness has been recently bribed to make a false statement, or the like. 1 Stark., Ev., Sec. 149; *Robb v. Hackley*, 23 Wend. 51.

The opinion of Bronson, J., in the case last cited is exhaustive on the subject.

The modification by the court of appellant's ninth instruction would seem to indicate the court admitted the evidence of prior declarations to show the condition of mind of appellee at the time the injuries were inflicted.

The declaration was made after the injuries were inflicted, and when appellee and Eakle were on their way home. They related to a past condition of the mind and were inadmissible.

"The declaration of the woman as to her suffering and condition at any particular time are evidence of her state at the time she made them. It is natural evidence upon those points—as her appearance, seeming agony of mind and other physical exhibitions, would be. The ground of receiving those declarations is that they are reasonable and natural evidence of the true situation and feelings of the person for the time being. But in reference to past periods, they have no such claim to confidence, as they are manifestly to that purpose, but the narration of one not on oath." *Lush v. McDaniel*, 13 Ired.; S. C., 57 Amer. Dec. 568.

"The statements of the injured party subsequently, and not substantially at the time of the occurrence, as to the circumstances, are not admissible." Note in 36 Amer. R., 828, to *Quaife v. C. & N. W. Ry. Co.*, 48 Wis. 513.

"And the declarations are admissible when they relate to the feelings at the time, or to the nature, symptoms or effect of the malady under which they are laboring at the time, and are regarded as mere hearsay, so far as they go beyond this limit. They do not extend to the admission of declarations as to previous malady or illness." *Allen v. Van Cleve*, 15 B. Mon. 236.

Declarations of mental feelings indicating present pain or malady, when made at the time, are not to be extended beyond the necessity on which the rule is founded." 5 Amer. & Eng. Ency. of L., 361.

Only admissible when they relate to present condition or State. Ill. Cen. R. R. Co. v. Sutton, 42 Ill. 438; 2 Greenl., Ev., Sec. 102, n. 3.

Anything in the nature of narration is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady. Id.; Bacon v. Charlton, 7 Cush. 581, 586; Whart., Ev., Sec. 268; Whart., Cr. Ev., 271.

"To determine the condition of mind it is admissible to put in evidence such expressions of the party as may be shown to have been instinctive, and not to have been uttered for the purpose of producing a particular effect. So, when the extent of a mental or other disease is in controversy, are contemporaneous declarations of the person so affected, though not as to conditions of prior diseases." Id. Sec. 272; Weyrich v. People, 89 Ill. 96; Ill. Cen. R. R. Co. v. Sutton, 42 Ill. 438; C. & N. W. Ry. Co. v. Howard, 6 Ill. App. 573, 574; 1 Greenl., Ev., Sec. 110.

In this case the third plea put in issue the condition or state of appellee's mind at the time of the infliction of the injuries. First Nat'l Bank v. Mansfield, 48 Ill. 496.

If, as we have endeavored to show, the declarations of appellee to Eakle were inadmissible, that error alone is sufficient to warrant a reversal. To quote from the opinion in Robb v. Hackley, 23 Wend. 53, "It is no answer to say that such evidence will not be likely to gain credit, and consequently will do no harm. Evidence should never be given to a jury which they are not at liberty to believe."

Messrs. J. C. SEYSTER and M. D. SWIFT, for appellee.

The statement made by the appellee to the witness Eakle when he first regained consciousness after the occurrence in question is properly admitted. This statement was properly

admitted to show the condition of defendant's mind at the time.

In *Reynolds v. Adams*, 90 Ill. 135, and *Cockeram v. Cockeram*, 17 Ill. App. 604, it is held that statements of the deceased whose will was contested are competent to show mental condition at the time the will was executed, or so near the time the same state of affairs must have existed.

But this statement was also admissible under another rule of law than the one which allows the admission of statements as to a person's bodily or mental condition.

And this is the rule, that where a party offers in evidence statements of a witness or party at variance with what such witness or party testifies, proof that such witness or party has made statements in accord with his testimony is admissible if such statement was made prior to such contradictory statements in point of time.

This kind of testimony has been held to be admissible in many cases among which are the following: *People v. Vaen*, 12 Wend. 78; *Jackson v. Etz*, 5 Cowan, 320; *Commonwealth v. Bosworth*, 22 Pick. 397; *Cook v. Curtis*, 6 Herr & Johns. 93.

And in Pennsylvania and Indiana such statements have been admitted without reference to their priority. *Parker v. Gonsalus*, 1 Serg. & Rawle, 536; *Henderson v. Jones*, 10 Ib. 322; *Coffin v. Anderson*, 4 Blackf. 398.

UPTON, J. This was an action of trespass *vi et armis* by the appellant against the appellee. In the trial court appellee interposed three pleas: general issue, *son assault demesne* and a special plea alleging that appellant first assaulted appellee by blows upon the head with a club which so affected his mind that he was unconscious and irresponsible for his immediate subsequent acts, in inflicting upon the appellant the alleged injuries complained of. Upon these pleas issue was joined and three trials with a jury have been had thereon in the Circuit Court of Ogle County. The first trial resulted in a verdict for appellee and on motion a new trial was granted; upon a second trial appellant obtained a verdict and a new trial was granted; upon the third trial a verdict was returned

for appellee, upon which judgment was rendered for costs, to reverse which, this appeal is prosecuted. We have been led to state the result of the several trials of this case in the Circuit Court to manifest the necessity of the care required in the instructions to the jury by the trial court. The evidence in the case is quite conflicting.

The alleged errors in the trial court complained of by the appellant here are :

First: That the court erred in giving to the jury the first, second and third of appellee's instructions.

Second: In refusing appellant's ninth instruction as offered, and in modifying the same and giving it to the jury so modified.

Third: In allowing a portion of the deposition of one Eakle to be read in evidence as to statements made by appellee concerning his mental condition, etc.

First. The first instruction offered by the appellee and read to the jury appears to be good as a proposition of law; but there does not appear to be any evidence on which to base it, and therefore it ought not to have been given. ♦

The second of appellee's instructions violates the rule of law laid down in *Donnelly v. Harris et al.*, 41 Ill. 128, and *Scott v. Fleming*, 16 Ill. App. 540, and was, therefore, erroneous.

We perceive no objection to appellee's third instruction given and we think it good.

Second. We think the trial court erred in not giving to the jury appellant's refused instruction numbered nine and also committed a further error in modifying the same and giving it to the jury as modified.

Appellee could not call for and put in evidence his own statements concerning the affray with appellant, or his own statements as to his mental condition at the time of such affray made at a time subsequent to the occurrence. This would be allowing him to manufacture evidence in his own behalf, which the law does not permit. It would be but mere self-serving statements at most, both in character and effect, which are not admissible as evidence, and therefore the modi-

Mettler v. Craft.

fication of the instruction was erroneous. The instruction as offered by appellant stated the correct rule of law upon the point to which it referred, and should have been given to the jury as asked, and the trial court erred in not so doing.

It is quite unlike the statement of a testator offered to show his mental condition at the time of making a will, etc., and is not governed by the same principle as that stated in *Cockram v. Cockram et al.*, 17 Ill. App. 604, and kindred cases therein cited.

Third. The evidence contained in the deposition of Eakle as to appellee's statements concerning his mental condition, etc., which was admitted for appellee, does not appear to have been *especially* objected to, and the other portion thereof was proper evidence. The answer to the twelfth direct interrogatory of the deposition referred to was only objected to in its entirety, as a whole, and a portion of the answer being proper evidence, the general objection can not be made availing.

For the reasons assigned we think there is manifest error in this record, and therefore the judgment of the Circuit Court will be reversed and the cause remanded for further proceedings not inconsistent with the views herein above expressed.

Reversed and remanded.

IRA METTLER
V.
JOSEPH CRAFT.

Real Property—Ejectment—Bill to Enjoin Execution of Judgment—Establishment of Lien for Improvements by Defeated Defendant—Chain of Title—Estoppel—Constructive Fraud—Insufficient Evidence to Establish—Statute.

1. Upon a bill in equity, filed by a defeated party (the defendant) in an ejectment suit to establish a lien and to recover for betterments on lots which, at the time most of the betterments were placed thereon, were owned

by a married woman who owned the reversionary interest in fee and whose title was of record and open to inspection, *held*, it being admitted that the case did not fall within the provisions of the ejectment law providing for the appointment of commissioners, etc., that the evidence failed to charge the defendants either with constructive fraud or with an estoppel, and that the bill could not be maintained.

2. The statute of this State in regard to allowance for betterments to a defeated party in ejectment was intended to cover the entire ground, especially in cases where the defeated defendant takes the initiative and the plaintiff makes no claim for rents and profits.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Ogle County; the Hon. JAMES H. CARTWRIGHT, Judge, presiding.

This was a bill in equity filed by the appellee against the appellant, seeking to subject lots 9 and 10 in block 5, in the city of Rochelle, to the payment in the nature of a lien of a certain sum of money expended by appellee and his intermediate grantors on the said lots by way of improvements, the legal title to the same having failed, and appellant having recovered the same in an action of ejectment against the appellee. The facts in the case appear about as follows:

The lots, by government description, were entered by Sheldon Bartholomew, the father of Maria Ross, who died in 1846, intestate, leaving as his only heir the said Maria, who, prior to her attempted conveyance hereinafter mentioned, became the wife of Isaac Ross, and also leaving his widow, Charlotte A., who afterward became the wife of Matthew B. Powell, who died prior to the time of the attempted conveyance hereinafter mentioned; that of the marriage of the said Maria and Isaac Ross, there was issue born alone capable of inheriting from its parents prior to the attempted conveyance of said Maria hereafter mentioned, so that at the time of the conveyance by said Maria and her husband hereafter mentioned the said Isaac was endowed with a life estate by curtesy in said lots, and Maria had an estate in fee for the remainder. It appears that the said Isaac Ross and Maria Ross and Charlotte A. Powell executed a supposed conveyance of said lots to Robert P. Lane, July 19, 1853, which was,

on the 18th of August, 1853, duly recorded, but the said deed made no mention of the fact that said Maria Ross was the wife of said Isaac Ross, nor did the certificate of acknowledgment of the notary public who took the acknowledgment contain any statement or certificate that said Maria Ross, wife of said Isaac Ross, was examined separate and apart from her husband, or that the contents and meaning of the deed were made known and explained to her, and hence, the acknowledgment and conveyance failed to conform to the statute and was ineffectual to convey the reversionary estate of said Maria Ross, which plainly appeared from the record, if the grantee in said deed and the subsequent grantees be held to acknowledge that the said Maria was at the time the wife of said Isaac. It appears that said Lane by quit-claim deed conveyed the land to Thomas D. Robertson, November, 13, 1855, and on October 30, 1862, said Robertson conveyed the same to Obadiah Walrath; that on the 24th March, 1864, said Walrath conveyed the same to Judson E. Carpenter; that on October 16, 1868, said Carpenter conveyed the same to appellee. These various deeds were duly recorded soon after their execution. The first deed from the Rosses to Lane conveyed about seven and three-fourths acres of land which were afterward by Lane laid out into town lots, in the original town of Lane, now Rochelle, and the deed from Lane to Robertson and the subsequent deed alone conveyed the town lots in question. The master's report shows that he finds that the intention of all the parties to the first deed was to convey to said Lane the title to said lots in fee. It appears that said Walrath, while he held the title, improved the lots by erecting a dwelling thereon; that while said Carpenter held the title, he built an addition to the dwelling-house on said lots, and made improvements to the value of \$700 or \$800, and occupied the same as a residence; that the appellee some time in 1869 made valuable improvements on the lots by building a barn and fencing to the value of \$325, and in 1885 made further improvements by building an addition to the house, putting on a bay window and digging a well at a cost of about \$850, and that all taxes were paid on said lots by Lane and his

grantees, and that the lots had no rental value aside from the improvements. The master further found the market value of the improvements was \$1,750, and the value of the lots without them was \$500. It appears that the said Maria Ross died in the year 1871; that Isaac Ross died in the year 1885. It appears that the said Maria Ross continued to live near the said premises much of the time after the land was laid out into town lots—within one hundred to one hundred and twenty rods of the said lots—within the said town of Lane, until her death, in 1871, being absent only about one year. There is no other evidence that Maria Ross knew that any of the improvements were being put on the lots, nor does it appear from the evidence that she ever gave any of the parties acquiring an interest in said lots any notice that she claimed any interest or title in the same. It appears that the appellant recovered in an ejectment suit against the appellee a judgment for the possession of the said lots and the title in fee at the March term of the Circuit Court in the year 1890, and that appellant derived title in fee to said lots by sundry *mesne* conveyances from the heirs of Maria Ross, deceased. The appellee claimed the said lots on his part through the deeds from Maria Ross to Lane and from Lane to him by the conveyances above set forth. This bill was filed by the appellee claiming to be the equitable owner of the improvements and to have an equitable lien on said premises for the value of such improvements to the extent that they had increased the value of the premises, and claiming that the appellant is not entitled to the possession of the premises until he shall have first paid appellee for the improvements, praying that appellant should be enjoined from suing out and having executed a writ of possession in said ejectment suit until the value of the improvements and lots could be ascertained and until the appellant should pay to appellee the value of such improvements, and equitable relief.

The court referred the case to the master in chancery, who took the evidence and reported to the court the facts as above stated; thereupon the court found the issues in favor of appellee and decreed that appellant pay him within one year \$1,750

for such permanent improvements, or that appellant might at any time within said time require complainant to pay him \$500, the value of said premises exclusive of the said improvements, upon appellant conveying the said lots to appellee. From this decree this appeal is prosecuted.

Messrs. O'BRIEN & O'BRIEN and DIXON & BETHEA, for appellant.

1. The life tenant can not charge the remainderman with improvements, even though of a permanent character. *Thurston v. Dickinson*, 2 Rich. Eq. 317; *Merritt v. Scott*, 81 N. C. 385; *Pratt v. Douglass*, 38 N. J. Law, 516; *Austin v. Stevens*, 24 Me. 520; *Runey v. Edmonds*, 15 Mass. 291.

The life tenant who makes improvements during the life estate can not receive the benefits therefor under the occupying claimants law. Note to *Stewart v. Matheney*, 14 Am. St. R. 540; *Smalley v. Isaacson*, 40 Minn. 450; *Barrett v. Stradl*, 73 Wis. 385; S. C., 9 Am. St. R. 795 and note, 805, 806, on improvements generally; *Elam v. Parkhill*, 60 Tex. 581.

An exception is where the life tenant goes on and finishes improvements begun by the donor of the estate. *Corbett v. Laurens*, 5 Rich. Eq. 301; *Sohier v. Eldredge*, 103 Mass. 345.

2. The rule in equity setting off to one tenant in common the improved portion enhanced by his meliorations, or, in a proper case, compelling compensation, is based upon principles peculiar to that class of cases. Then the owner does not recover his land at law, but the proceeding is in its inception and throughout purely equitable and all are compelled to do equity. The land, if incapable of division, must be sold, and as an incident only is the improver entitled to compensation.

3. There is another class of cases where it might at first seem the remainderman was obliged to reimburse the life tenant for improvements, but they rest on an equity peculiar to themselves. That is, where lands are devised or conveyed to trustees for one for life and another in remainder, power is frequently conferred on the trustees to improve, sell and reinvest, etc.

If improvements are made out of the income of the life tenant, equity will make a proportionate charge upon the estate of the remainderman upon the principle of carrying out the trust.

4. And a doctrine akin to this, under some circumstances finds a legitimate application to the case of a mortgagee in possession who makes improvements, or a purchaser under a foreclosure sale when a junior mortgagee or judgment creditor redeems. These are some of the exceptions, but the rule itself is well established.

"The full doctrine of estoppel is not applied to a married woman, because she is not *sui juris*, but under disability." *Stevenson v. Osborne*, 41 Miss. 119; *Lowell v. Daniels*, 2 Gray, 161; *Keen v. Hartman*, 12 Wright (Pa.), 497; *Martin v. Martin*, 12 La. An. 86; *Lothrop v. Foster*, 51 Me. 367; *Burns v. Lynde*, 6 Allen, 305; *Towles v. Fisher*, 77 N. C. 443; *Lyman v. Cessford*, 15 Ia. 233.

"Hence, as she could not contract at common law, her *quasi* contracts were not estoppels." *Glidden v. Strupler*, *supra*; *Plumer v. Lord*, 5 Allen, 460; *Davenport v. Nelson*, 4 Camp. 125; *Bodine v. Killeen*, 53 N. Y. 93; *Todd v. Railroad*, 19 Ohio St. 514.

"Because this would remove her incapacity and allow her to bind herself by way of estoppel; but, in the absence of her husband's coercion, she can bind herself by way of estoppel by some affirmative act of fraud;" citing *Towles v. Fisher*, 77 N. C. 443; *Lyman v. Cessford*, 15 Ia. 233; *Schwartz v. Saunders*, 46 Ill. 18; *Oglesby Coal Co. v. Pasco*, 79 Ill. 170; *Sharpe v. Foy*, (L. R.) 4 Ch. App. 35; *Jones v. Frost*, (L. R.) 7 Ch. App. 713. *Contra*: *Bemis v. Call*, 10 Allen, 512; *Palmer v. Cross*, 1 Sm. & M. 48; *Rangley v. Spring*, 21 Me. 130.

"A mere passive silence in regard to her rights is not such a fraud as will amount to an estoppel." *U. S. Bank v. Lee*, 13 Pet. 118; *Palmer v. Cross*, 1 Sm. & M. 48, 68; *Drake v. Glover*, 30 Ala. 382; *Canty v. Sanderford*, 37 Ala. 91; *Havener v. Godfrey*, 3 W. Va. 426; *In re Lush's Trust* (L. R.), 4 Ch. App. 591.

"It must be a positive fraudulent act." *Amsley v. Mead*, 3 Lans. 116; *Westgate v. Munroe*, 100 Mass. 227.

Mettler v. Craft.

“Such as where she had made a sworn disclaimer of ownership.” Cooley v. Steele, 2 Head. 605; Lathrop v. Ass’n, 45 Ga. 483; Cravens v. Booth, 8 Tex. 243.

“Or her announcement at the sale of her husband’s real estate that she would not claim dower. (But this has been doubted and is supported by one case only.)”

“Her active connivance in her husband’s fraud.” Anderson v. Armstead, 69 Ill. 456; Bodine v. Kelleen, 53 N. Y. 93.

“Or knowingly permitting him to gain credit on the faith of property which in truth belongs to her.”

“On the other hand, any contract which a married woman, by false representations, induces another to enter into with herself is not an estoppel.”

“She can only be divested of her property in the method prescribed by law.” Morrison v. Wilson, 13 Cal. 498; McIntosh v. Smith, 2 La. Ann. 758; Bisland v. Provosty, 14 La. Ann. 169.

“Unless where the fraud is intentional, and reaching an estoppel.” Saxton v. Wheaton, 8 Wheat. 238.

It may be difficult to reconcile Patterson v. Lawrence, 90 Ill. 174, with Weiland v. Kobick, 110 Ill. 16, where it is held the fraudulent representations of a minor do not estop him; but in this case it is unnecessary to attempt it, as the furthest the case of Patterson v. Lawrence goes, is to hold a *feme covert* estopped by her active or positive fraud.

The best and most authoritative discussion on the subject is found in Oglesby Coal Co. v. Pasco, 79 Ill. 164, where the court say: “The question must be determined with reference to the law in force in relation to the separate property of married women at the time the interest descended to Abigail Pepson, and when the conveyances to John Corrigan and herself were made, that is, the 4th day of May, 1865. ‘The weight of reason and authority,’ says Bigelow, in his work on Estoppel, page 490, after a careful review of the adjudged cases, ‘seem to establish the proposition that a married woman may preclude herself from denying the truth of her representations, but only in the case of *pure torts*, and that if her conduct is so connected with contract that the action

sounds in contract, there can be no estoppel.'” See *Schwartz et ux. v. Saunders*, 46 Ill. 18, and *Anderson v. Armstead*, 69 Id. 452.

But in *Moulton v. Hurd*, 20 Ill. 137, *Lindley v. Smith et al.*, 58 Ill. 250, and *Hutchings v. Huggins*, 59 Ill. 29, it was held that a married woman can only alienate her real estate by joining with her husband in a deed, acknowledged as required by statute, and that a court of equity has no power to reform her deed for any mistake in its provisions or in the certificate of acknowledgment. And in *Bressler et al. v. Kent*, 61 Ill. 426, it was held the same doctrine is applicable to cases arising since the law of 1861. And *Rogers v. Higgins et al.*, 48 Ill. 212, is a still stronger case.

The law presumes that our dealing with a person under disability, and knowing the fact, intends to incur the consequence of his acts, and equity will not relieve against him, or otherwise afford relief.

In England a married woman is liable jointly with her husband for torts committed by her, but she can not be made liable on a contract on the ground that it was induced by her fraudulent representations. 2 *Lawson's Rights, Rem. & Prac.*, Sec. 754; *Liverpool Loan Asso'n v. Fairbust*, 9 Ex. 429.

Thus an action will not lie against a wife and husband for a fraud of the wife in representing herself to be single, whereby plaintiff was induced to take her promissory note. *Ib.*

A married woman is not estopped from setting up her coverture to an action on her judgment bond, by the fact that she falsely represents herself as single, and thereby obtains the consideration for which it was given. *Keen v. Coleman*, 39 Pa. St. 299; 80 Am. Dec. 524.

How it is in this State, where the wife, by active fraud or passive fraudulent concealment induces another to enter into a contract, seems to us to be unsettled, unless the cases of *Patterson v. Lawrence*, 90 Ill. 174, and *Weiland v. Kobick*, 110 Ill. 16, can be reconciled. Be this as it may, there can be no pretense in this case that there was any active fraud or even fraudulent concealment—any *pure tort* “not grounded

or predicated on contract." Compare *Matthews et al. v. Cowen et al.*, 59 Ill. 341.

- It is said in *Lawson's Rights, Rem. & Prac.*, 2701, that "to pass an estate by estoppel the party must have power to pass it by direct conveyance."

In discriminating between the decisions of the different States it should be borne in mind, as is said by Schouler in his work on *Dom. Rel.*, 154: "That in some States the separate conveyance of a married woman, or her execution jointly with her husband, but without observance of the statute formalities, is void. But in others such irregularities are not held fatal to the instrument, and she is bound on the usual principles."

Of the latter sort the author cites *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9; *Card v. Patterson*, 5 Ohio, 319; *Smith v. Perry*, 26 Vt. 279.

This explains the decision in *Hill v. West*, 31 Amer. Dec. 442, to the effect that the covenants of a married woman in a deed of her real estate estop her from asserting a subsequently acquired title.

The rule in our State is the other way. *Lindley v. Smith*, 46 Ill. 523; *Rogers v. Higgins*, 48 Ill. 211; *Mason v. Brock*, 12 Ill. 273, and many other cases.

The same distinction is stated by Lawson, thus: In some States her conveyance, even where her husband joins, but without these statutory formalities is void; citing *Bressler v. Kent*, 61 Ill. 426; while in others irregularities in the execution are not necessarily fatal to the instrument. 2 Law., R., R. & P. 741, citing the same authorities cited by Schouler, and also *Strickland v. Bartlett*, 51 Me. 355; *Hollingsworth v. McDonald*, 2 Har. & J. 230; S. C., 3 Am. Dec. 545; *Womack v. Womack*, 8 Tex. 397; 58 Am. Dec. 119.

In considering the question of estoppel *in pais*, this distinction should be borne in mind as materially affecting the weight to be given in our courts to the decisions in other States. *Massie v. Sebastian*, 4 Bibb, 436; *Nash v. Spafford*, 10 Met. 192; *Colcord v. Swan*, 7 Mass. 291.

An injunction will not be allowed against proceedings in

ejectment brought by the owner of land after attaining his majority who, while an infant, had contracted for the sale of the land, and given a bond for the conveyance, but had repudiated the contract on coming of age, and refused to ratify the sale, even though the purchase money has been paid. *Browner v. Franklin*, 4 Gill. 463.

An infant, if he has parted with the consideration, may disaffirm his deed after he arrives at age, without restoring the consideration. *Bennett v. McLaughlin*, 13 Ill. App. 351; *Bishop on Contracts*, 921; *Green v. Green*, 69 N. Y. 553; *Chandler v. Simmons*, 97 Mass. 578; *Bartlett v. Drake*, 100 Mass. 174; *Miller v. Smith*, 26 Minn. 248; *Tucker v. Moreland*, 10 Pet. 65; *Shaw v. Boyd*, 5 S. & R. 309.

A *feme covert* was not, under the law of 1861, or that of 1869, bound by her covenants in a deed, nor could she be estopped by her declarations or admissions therein. *Snell et al. v. Snell et al.*, 123 Ill. 403; *Strawn v. Strawn et al.*, 50 Ill. 37; *Botsford v. Wilson et al.*, 75 Ill. 135; *Sanford v. Kane*, 24 Ill. App. 509; *Schouler's Dom. Rel.*, 155; *Rawle on Cov. for Tit.*, 251; *Gonzales v. Hukel*, 49 Ala. 260; *Shumaker v. Johnson*, 35 Ind. 33; *Thompson v. Merrill*, 58 Ia. 419; *Hobbs v. King*, 2 Met. (Ky.) 141; *Hempstead v. Easton*, 33 Mo. 142; *Wadleigh v. Glines*, 6 N. H. 18; *Dem d. Hopper v. Demarest*, 1 Zab. (N. J.) 541; *Martin v. Dwelly*, 6 Wend. 14; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 424; *Dominick v. Michael*, 4 Sandf. Ch. 424; *Groat v. Townsend*, 2 Hill (N. Y.), 557; *Edwards v. Davenport*, 4 McCr. U. S. C. C. 34; *Lowell v. Daniels*, 2 Gray, 168.

In some States it is provided by statute that a married woman shall not be bound by covenants in her deed though it be properly executed and acknowledged. *Rev. Stat. Ill. 1845*, Ch. 24, Sec. 17; *Rawle on Cov. for Tit.*, 251, citing enactments of Virginia, Delaware, Illinois, Indiana, Michigan, Missouri and Oregon; *Strawn v. Strawn*, 50 Ill. 33.

The great weight of authority is this way without the aid of statutes. *Rawle on Cov. for Tit.*, Sec. 306.

Mere acquiescence for three, or even ten years (in the absence of any statute), after arriving at age, without any

affirmative act, is not a ratification by the infant. Jackson v. Carpenter, 11 Johns. 542; Jackson ex dem. v. Durham, 14 Johns. 123; Green v. Green, 69 N. Y. 553; 23 Me. 517.

It is said in the case in 11 Johns. 542: "It would be contrary to the benign principles of the law by which the imbecility and indiscretion of infants are protected from injury to their property, that a mere acquiescence, without any intermediate or continued benefit, showing his assent, should operate as an extinguishment of his title." With how much greater force do these principles apply to a *feme covert*, whose contracts are absolutely void, and not, like an infant's, merely voidable.

"In respect to property not settled to her separate use, a married woman can not bind herself in equity in matter of contract any more than she can at law, but coverture is no excuse in equity for fraud. The acquiescence, however, of a married woman in a transaction will not bind her if the person with whom the transaction was entered into knew that she was a married woman." Kerr on Fraud & Mis., 150; Nicholl v. Jones, 36 L. J. Ch. 554; Wilks v. Fitzpatrick, 1 Humph. 541; Glidden v. Strupler, 52 Pa. St. 400.

Acquiescence, silence, or the mere omission to assert her rights, does not apply to or estop a married woman where her husband by fraud makes an unauthorized use thereof, or obtains credit on the faith of her property. Kerr on Fraud & Mis., 149; Bank of U. S. v. Lee, 13 Pet. 107; Hunter v. Foster, 4 Humph. 211; Gatting v. Rodman, 6 Md. 289; Drake v. Glover, 30 Ala. 382; McIntosh v. Smith, 2 La. Ann. 756; Palmer v. Cross, 1 Smed. & M. 48; Glidden v. Strupler, *supra*; Lowell v. Daniels, *supra*; Keen v. Coleman, 5 Wright (Pa.), 299; Stephenson v. Osborne, 41 Miss. 119, 120; Martin v. Martin, 22 Ala. 86; Lothrop v. Foster, 51 Me. 367; Plumer v. Low, 5 Allen, 450; Davenport v. Nelson, 4 Camp. 25; Bodine v. Killeen, 53 N. Y. 93.

Messrs. M. D. HATHAWAY and WILLIAM LATHROP, for appellee.

It was settled long prior to Bright v. Boyd, 1 and 2 Story's Reports, that courts of equity, where a complainant asked

relief against a person in possession of lands who had made permanent improvements under the belief that he was the owner of the lands, compelled or required such complainant to compensate such possessor, to the extent his permanent improvements had enhanced the vendible value of the land, as a condition of granting relief to complainant, and gave the possessor a lien upon the premises for the payment of such enhanced value. 2 Story's Equity Jurisprudence, 799 a, 799 b; 3 Pomeroy's Equity, Sec. 1241; Neesom v. Clarkson, 4 Hare, 97; Putnam v. Ritchie, 6 Paige, 390, Sec. 404.

Story's Equity was published in 1835; Putman v. Ritchie was decided in 1837; Bright v. Boyd, decided by Judge Story in 1841 and 1843.

In Bright v. Boyd, Bright was a purchaser at an administrator's sale. The administrator's deed was void, because the administrator had not observed all the requirements of the statute in making sale and conveyance. Bright had taken possession, and made valuable improvements. Upon being evicted he filed his bill for relief, and asking pay for improvements. While equity could not relieve against a defective execution of a statutory power, it did grant the purchaser relief to the extent of his permanent improvements.

In the case at bar, the deed of Maria Ross is void for exactly the same reason, viz.: A defective execution of a statutory power. Here the statutory power was one enabling a married woman to convey her real estate, and the defect was in the certificate of acknowledgment. As in the Bright case, so here, the grantee upon being evicted because of the defective deed, has filed his bill asking pay for his permanent improvements.

For confirmation of this equitable ruling of Bright v. Boyd, see 15 Am. Dec., Jackson v. Lomis, and reporters' notes, page 353; 30 Am. Dec.; Scott v. Dunn, and reporters' notes, pages 181, 182; 40 Am. Dec., Herring v. Pollard, Ex'rs, and reporters' notes, 653, etc.; Union Hall Association v. Morrison, 39 Md. 281; Hatcher v. Briggs, 6 Oregon, 31; Story, Eq. Jur., see notes to Secs. 385, 388, 799 b, 1237, etc.; Preston, trustee, v. Brown, 35 Ohio State, 18; Thomas v. Thomas, 16

B. Monroe, 420; Hawkins v. Brown, 80 Kentucky, 186; Valle v. Fleming, 29 Mo. 152; Kanawha Coal Co. v. Kanawha & Ohio C. Co., 7 Blatchford, 391; Griswold v. Bragg and wife 48 Conn. 577; Ross v. Irving, 14 Ill. 171, see 176-178; Cable v. Ellis, 120 Ill. 136, see 152; 2 Warvelle, Vendors, Sec. 8, pages 904, 905; see also 10 Am. & Eng. Encyclop., page 243, etc.

Our own Supreme Court in Ross v. Irving, etc., 14 Ill. 171, on pages 176 and 177, has not only fully indorsed and commended the equitable doctrine of Bright v. Boyd, but has in subsequent cases adopted and declared the rule of equitable relief in quite as full and liberal measure as given in that case. See Breit et al. v. Yeaton et al., 101 Ill. 242; Cable et al. v. Ellis et al., 120 Ill. 136.

In this litigation certain persons not made parties came and by petition intervened and prayed to be made parties, and allowed a first lien on the premises for alleged improvements made by them.

The court in passing upon their right to pay for improvements, declared the rule in equity of payment for permanent improvement as follows, viz.: see page 152.

“Through the research of counsel for appellee Ellis, our attention has been directed to still another line of cases bearing upon this question, and while no one of these cases, because of variant and distinguishing circumstances, can be accepted as decisive of the question here, or as embodying all the elements of this equitable doctrine as recognized and applied by the court, an examination of all the cases has satisfied us that the true rule is, that where improvements upon real estate of a permanent character, are made in good faith by one in possession, believing himself to be a *bona fide* purchaser or owner for value, and under circumstances justifying such belief, and the expenditure is reasonable in amount and of benefit to the estate, allowance may, in a court of equity, be made therefor; but the person claiming such allowance will be charged with the value of the use and occupation of the premises.” Citing McConnel v. Holobush, 11 Ill. 61; Breit v. Yeaton, 101 Ill. 242; Bradley v. Snyder, 14 Ill. 263;

Miller v. Thomas, 14 Ill. 428; Gardner v. Diederichs, 41 Ill. 158; Kinney v. Knoebel, 51 Ill. 112; Roberts v. Fleming, 53 Ill. 196; Smith v. Knoebel, 82 Ill. 392; Worth v. Worth, 84 Ill. 442; Ebelmesser v. Ebelmesser, 99 Ill. 541. .

From these cases the court extracts the equitable rule to be applied in determining the rights of litigants. The rule is announced with deliberation and without qualification.

It is to be observed further that the rule of equity declared in Bright v. Boyd and by our own Supreme Court is deduced from the duty and obligations of the court to enforce what is just and honest and to observe the maxim that no one be suffered to grow rich by the misfortune of another. The rule is declared without exception, and neither infants nor married women are excepted from its operation.

Our Supreme Court in Ross v. Irving, etc., 14 Ill. on page 183, declares: "We can not but regard it (the occupying claimant law) as highly equitable in its character and constitutional in principle."

And the court in Potts v. Cullom et al., 68 Ill. 217, declares that the Legislature, by Sec. 55 of the Ejectment Act, intended to afford a speedy method of adjusting the value of permanent improvements, and on page 220, says Sec. 55 "makes no exception in cases where minors are plaintiffs, but is general, and seems to embrace all plaintiffs (in ejectment), regardless of disability." And equally without exception and regardless of disability is the rule in equity where the *bona fide* possessor is evicted and asks compensation for his permanent improvements.

A *bona fide* purchaser without notice, within the meaning of a court of equity, is one who has purchased under such circumstances as to be protected in his purchase against prior claimants. William et al. v. Tilt et al., 36 N. Y. 319; Dresser v. Missouri & Iowa R. R. Construction Co., 93 U. S. 92.

LACEY, J. The only question for us to decide in this case under the circumstances shown by the evidence is whether the appellee has a right to maintain this action for the recovery of the value of the improvements placed on the lots by the

various grantees of Lane's title, including those placed thereon by appellee. It is admitted by the counsel for appellee that his title is of such a character as to deprive him of the right to the appointment of commissioners to estimate the value of the permanent improvements in the manner provided for in the Ejectment Act.

That act provides as follows: "Every person who may hereafter be evicted from any land for which he can show a plain, clear and connected title in law or equity deduced from the record of some public office without actual notice of an adverse title," etc., may have his valuable improvements estimated and secured to him as provided for in the act.

This may be done by the appointment of commissioners to ascertain the value of such improvements and by the allowance of the same by the court as an adjunct to and continuation of the ejectment suit as provided for in the statute.

It would seem plain that if these damages claimed by appellee could have been assessed under the provisions of the statute then appellee had a plain and adequate remedy at law and the court below should not have entertained this bill. This is admitted by the appellee in his brief, but he insists and claims that inasmuch as Maria Ross was a married woman and the acknowledgment of her deed to Lane was not in the form required by the statute to convey a married woman's estate, the record of title did not show on its face "a clear, plain and connected title in law or equity of record connecting it with a public office," and therefore appellee could not recover by virtue of the statute; but that he has an equity outside and independent of the statute to recover for the permanent improvements by virtue of the principle of the common law. It is insisted also, as one of the equities, that the uncontroverted acts of Maria Ross in making the deed in question to Lane and her presumed knowledge of the making of the improvements on the premises constitutes a case of constructive fraud so far as to charge her, her heirs and grantees, with the enhanced value of the premises by reason of permanent improvements. It is thought that her acts, while not sufficient to bar her title to the premises and that

of her heirs and grantees, are yet sufficient to estop her from claiming the land free from the supposed lien of the incumbrance created by the improvements.

We, however, take a different view of the case on this point, and see nothing in the acts or conduct of Maria Ross to create an estoppel of this kind against her. At the time she executed the supposed deed to Lane she was a married woman, the wife of Isaac Ross. Although this fact did not appear from the face of the deed, it was as well known to Lane, the grantee, as it was to her and Ross. She made no representations to them whatever, so far as the evidence shows, and they were as capable of judging of the validity of the deed as she was. If Lane supposed he was getting her title in fee it was a mistake of law on his part as much so as it was on hers. The law as well settled by "the weight of reason and authority," says Bigelow in his work on Estoppel, p. 490, after a careful review of the adjudged cases "seems to establish the proposition that a married woman may preclude herself from denying the truth of her representations, but only in the case of pure torts, and that if her conduct is so connected with contract that the action sounds in contract, there can be no estoppel."

This quotation from Bigelow is approved in *Oglesby Coal Co. v. Pasco et al.*, 79 Ill. 164. In this opinion several illustrations of the doctrine are given from decisions of the Supreme Court of this State, such as, "If the wife fraudulently permit her husband to represent himself as the owner of her separate property, and procures mechanics to make valuable improvements thereon without disclosing her ownership or repudiating his authority, she is estopped afterward from denying his authority to cause the improvements to be made, when the mechanics seek to enforce liens for the payment of the amount due," and the like cases.

But in other cases it is shown to be holden that "a married woman can only alienate her real estate by joining with her husband in a deed for that purpose, acknowledged as required by statute, and that a court of equity has no power to reform her deed for any mistake in its provisions or in a certificate

Mettler v. Craft.

of acknowledgment." And it was held that "the same doctrine is applicable in cases arising since the law of 1861, relating to the separate property of married women, went into force, as well as before." Another case therein cited holds that "the law presumes that one dealing with a person under disability, and knowing the fact, intends to incur the consequence of his own act, and equity will not relieve him against them, or otherwise afford relief." In conclusion the court says: "It is clearly deducible from these cases that a wife can only be estopped in cases where she has been guilty of actual fraud, either by suppression of some fact upon which she knew the other party was relying, or a false representation of material facts which induced action."

In *Robbins et al. v. Moore et al.*, 129 Ill. 30, the doctrine of what amounts to an estoppel *in pais* is quite fully discussed, and the following rule is deduced from the authorities there cited, to wit: "That where the foundation of the estoppel is silence and omission to give notice of existing rights, the party relying on the same must not have had the means of ascertaining the true state of the title by reference to the public record; but that such rule does not apply to a case where the land owner has not actively encouraged and induced the injured party to act. In the latter case the party making the declaration acted on will be estopped, although he may have been ignorant of his true rights. The other party may rely on his representations without further inquiry, and act upon the assumption that he is cognizant of his rights and knows the condition of his own title."

If we hold that this doctrine as above quoted is applicable to the case of a married woman when it concerns her property rights, we think it comes far short of governing a case like the one at bar. If it be conceded that Maria Ross knew that the intermediate grantees, Walrath, Carpenter and appellee, were putting the improvements on the lots in question under the supposition that they owned the title in fee, and she failed to make known to them her claim to the property, there could be no estoppel against her under the above rule, for we think the evidence fairly fails to show that she was cognizant of her

own rights in the premises, or that she actively encouraged or induced either of the above named holders of the lots to make the improvements which they did. The parties making the improvements in question knew or might have known as much about the condition of the title at the time the improvements were made as did Mrs. Ross. She was not the inducing cause of the improvements being made and was not called on by them to speak as to her rights; and she will be presumed to have acted in equal good faith in not protesting against the improvements, as they were in making them. Furthermore, the fact that they held a life interest in the estate of Isaac Ross, if known to Mrs. Ross, may have led her to suppose that these improvements, if she knew they were being put on the lots, were so being done with reference to such interest in them as the parties actually held and not under the supposition that they owned the title in fee. And we understand the law to be that such would be the presumption.

Neither of the occupying claimants, either before or after the improvements were put on the lots, ever approached Mrs. Ross in regard to the matter of placing such improvements thereon or asked her in regard to her claim of title thereto. And mere acquiescence, without some new fraud or tort, during the continuance of the same situation in which the party entered into the contract, goes for nothing. This is a general rule of law. *Gowland v. DeFarea*, 17 Vesey, 20-25. Mr. Carpenter and the appellee clearly knew, as the evidence shows, before they placed any improvements on the lots, that Mrs. Ross was the wife, and had been for many years, of Isaac Ross, and must have been such when the deed to Lane was made; they also must be held to have had constructive notice, at least, as to what the record shows in reference to the condition of their own title. We cite the following quotation and authorities: "A purchaser is supposed to have notice of any defect of title apparent on the face of his own papers or by the record, * * * but will not be required to look for latent defects in the chain of conveyances when regular on their face and apparently conveying the legal title." *Robbins et al.*

Mettler v. Craft.

v. Moore et al., 129 Ill. 30; Hill et al. v. Blackwelder, 113 Ill. 283; Dart v. Hercules et al., 57 Ill. 446.

The record shows that Bartholomew, the father of Mrs. Ross, was the patentee. The first conveyance of record was from Isaac Ross, Maria Ross and Mrs. Powell, the widow of Bartholomew, deceased, to Lane. This on the face of the record showed a break in the chain of title; certain facts *dehors* the record must be known to one examining the title in order to show a perfect chain of title. The first would be that Bartholomew, the patentee, had died intestate and that Mrs. Ross was his only heir; but as the record of the deed to Lane showed that Mrs. Ross had conveyed the land by another name than that of her maiden name, the natural and necessary inquiry would be to one examining the title, how her name came to be changed, and as she and her husband lived in Rochelle at the time, the least inquiry would have led to a knowledge of the fact that she was the wife of Isaac Ross at the time of the execution of the deed to Lane. These facts were amply sufficient to put Lane and the subsequent grantees, if they did not otherwise know, upon their inquiry, and having once been put upon their inquiry they must be held to a knowledge of all the facts which such inquiry would have disclosed. Doyle v. Teas, 4 Scam. 202, and many subsequent cases. So that Walrath, as well as Carpenter and appellee, who had actual knowledge, must be held to notice that Mrs. Ross was the wife of Isaac Ross when she executed her attempted deed. We must also presume that as the improvements put on the place by Walrath had been so long ago that at the time the Carpenter and appellee's improvements were put on, the lots must have been worth very little, as the value of those put on by the two latter as shown by the evidence far exceeded the entire value of the improvements allowed by the court.

We now having disposed of the question of estoppel, we next proceed to notice the claim of appellee that he had a right to the allowance as against the appellant for the value of the improvements put upon the lots as a matter of natural equity. Many adjudged cases are cited by appellee and some

authority from the text books in support of his position; but we think none of them are applicable to this case under the laws of this State. The case of *Bright v. Boyd*, 2 Story, 605, appears to be very much relied upon, but upon examination of the facts of that case, we find that it was there held that the want of notice of the defects of title was essential to recovery. If the occupant had notice or could have had notice by reasonable search of the record, then we apprehend the rule would not apply, and especially so as the statute requires the title to be "clear, plain and connected of record." In the case at bar the claim for betterments is attempted to be fastened as a lien on the title itself of appellee. We are of the opinion that the statute of Illinois in regard to the allowance of betterments was intended to cover the entire ground, and that such claims are limited by the statute, especially in all cases where the defendant takes the initiative and becomes the claimant for betterments, and where the plaintiff makes no claim for rents and profits. In the first place, the statute allows a claim for betterments or improvements made on the premises to the amount of the plaintiff's claim for rents and profits as may be allowed by law to be set off against such claim in favor of the defendant in ejectment, and in estimating the plaintiff's damages for detention of the premises, the value of the use by the defendant of any improvements made by him will not be allowed to the plaintiff, but in no case will the proprietor of the better title be obliged to pay to the occupying claimant for improvements made after notice, more than what is equal to the rents and profits. Aforesaid sections 41 and 54, Ejectment Act, laws of 1869.

This allowance is given by the statute whether the defendant has a good or bad title, or no title at all, or without reference to his notice of whether he had a good or a bad title; but it has no reference to a case where the charge for improvement is sought to be recovered as a lien on the title of the land itself. The above claims for betterments by the defendant and also for rents and profits by the plaintiff were subject to the statute of limitations, as other like claims which ran against such improvements as well as the rents and profits,

Mettler v. Craft.

commencing from the date of filing the suggestion of claim under the 37th section of the act. *Ringhouse v. Keener*, 63 Ill. 230. There is only one case provided for in the statute where a claim for betterments and valuable and lasting improvements is allowed to become a charge against the land itself, and that is provided for in the 47th section of the act; and that must be a case where the defendant can show a "plain, clear and connected title in law or equity deduced from the record of some public office without actual notice of an adverse title in like manner derived from record," and in that case "he shall be free from all charges of rents, profits or damages, provided he shall have obtained peaceable possession of the land," as well as be allowed for the betterments. But in this case it is admitted no such clear chain of title is shown; otherwise the proper remedy of the appellee would have been to procure the appointment of a commission under the statute at the termination of the ejectment suit to estimate the value of the permanent improvements and not by bill as here attempted. See *Asher v. Mitchell*, 9 Ill. App. 335. The Legislature, no doubt, intended to give a party who was innocent of any defect in his title, and which showed on the record to be good and a complete chain, the benefit of all permanent improvements innocently placed on the land and which enhanced the value thereof, even to the extent of compelling the rightful owner to pay for them before he should recover the land or to accept the value of it without the improvements and convey the legal title to the occupying claimant. But it appears to us that the fact that the Legislature by its enactment covered the above case and no other, it by implication excluded other cases, and especially a case like the one at bar, where the defect in the title appeared of record and where the occupant of the lots could only be an innocent claimant by disregarding negligence and ignorance of the laws of the land. It is a fundamental and general rule of law that ignorance of law excuses no one. Every one is held in his dealings to know the law, and equity will rarely relieve against mistakes occurring on account of ignorance of the law. In the present case the title was of record, and only an

examination of the record of the deed from Isaac Ross and Maria Ross to Lane, with the knowledge which Carpenter and appellee actually had and which Walrath was bound to have, that Mrs. Ross was a married woman at the time, was necessary to disclose the illegal nature of the conveyance. It appears from the evidence that appellee and the intermediate grantees between Lane and himself never even examined the deed to see whether it was a conveyance or not, with the exception probably of the first grantee, Lane, who alone can plead ignorance of the law, as the subsequent grantees had not even informed themselves of the facts. But as Lane made no improvements, his attitude in the matter is immaterial. As illustrative that ignorance of law in such matters is no excuse, we cite *Dart v. Hercules et al.*, 57 Ill. 446. The doctrine of the court in *Cable et al. v. Ellis et al.*, 120 Ill. 136 is cited. The court say as to the rule allowing for improvements, that the rule is: "Where the improvements upon real estate, of a permanent character, are made in good faith, by one in possession, believing himself to be a *bona fide* purchaser for value, and under circumstances justifying such belief, and the expenditure is reasonable in amount, allowance may, in a court of equity, be made therefor; but the person claiming such allowance will be charged with the value of the use and occupation of the premises."

The case in which the above rule was laid down did not involve a decision of the question, and the above could hardly be regarded as authority. The rule, however, is no doubt correct in a proper case, and in just what case it would be applicable we are left in the dark. The class of cases cited by the court in that case are cases where the complainant has appealed to a court of equity for relief, and in such cases it is a maxim of the law that he who seeks equity must do equity. Courts are quite liberal in applying this rule in a case where a court of equity is applied to for relief. The rule, as announced above, is restricted in its application to cases where "the circumstances justify a belief in the claimant that he is the *bona fide* owner of the land." We do not think, in a case like this, that the facts could justify such a belief as

Mettler v. Craft.

will appear from what we have said. The rights of minors and married women are the peculiar care of the courts, and we think the policy of the law would forbid that a *feme covert* should be *improved* out of her estate, save in the case provided for in this statute which we have above quoted.

This is an unprecedented suit. A bill in equity is filed by a defeated party in ejectment to recover for betterments on lots which, at the time the betterments, or the most of them, were placed thereon, belonged to a married woman who owned the reversionary interest in fee, and whose title was of record and open to inspection, and it was only ignorance of law and negligence to examine the title which caused the belief on the part of appellee and his remote and immediate grantors that they had a good title. It is not a case provided for in the statute. The appellant, the grantee of the legal heirs of the original owner, Mrs. Ross, is not coming into court to ask equitable relief, but has already recovered his property in a court of law. And we think there is no law authorizing appellee to maintain this bill. It is entirely unprecedented in this State, so far as we can discover. In 3 Pomeroy's Eq. Jur., Sec. 3, 1241, the author says: "Under proper circumstances the owner is compelled to make compensation when he himself seeks the aid of equity, but not, it is held in *Nieson v. Clarkson*, 4 Hare, 97, when the one making the improvements is an *actor*." In the same section and paragraph it is said: "If, therefore, the true owner can recover his land by an action at law, equity will not, *in the absence of fraud*, compel him to reimburse the occupant, even if in good faith, for disbursements, made in repairs," * * * and adding: "This rule has been changed by statute in several of the States, which allow compensation to defendants even in actions of ejectment when the land is recovered from them, for the betterments which they have added to the land."

It will be seen that the statute of Illinois has changed the rule; but as we have shown it fails to cover a case like the one at bar, and outside of that there is no remedy. And in this case there is no element of fraud, as we have shown. *Gracine v. Cullen*, 23 Gratt. (Va.) 266, 298; *Dawson v.*

Grow, 29 W. Va. 333; 2 Kent's Com. 333, 338; Chambers et al. v. Jones, 72 Ill. 275.

We are of the opinion that the bill can not be maintained. The court below therefore erred in passing the decree against the appellant, requiring him to pay appellee \$1,750 for betterments on the lots. The decree of the court below is therefore reversed and the cause remanded to the court below with directions to dismiss the bill.

Reversed and remanded with directions.

OSCAR T. FREEMAN

v.

GEORGE L. ARNOLD.

Mechanics' Lien Law—When Lien Attaches—Mortgage—Priority.

Under Secs. 1 and 2 of Chap. 82, R. S., a lien for labor or material attaches at the time when the contract under which the same was furnished, was made.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. HENDRYX & CRAIG, for appellant.

Mr. GEORGE W. THOMPSON, for appellee.

UPTON, J. This was a petition for a mechanic's lien, filed by the appellee in the Circuit Court of Knox County, to the February term thereof, 1890, and to which Freeman, the owner, and O'Conner, the mortgagee, were made parties. It appears that in July, 1889, Freeman (who alone appeals) contracted with Geo. L. Arnold to do the mason work on a house he was about to build upon a lot in the city of Galesburg, in the petition particularly described. Appellee was to lay the brick

Freeman v. Arnold.

in the wall, at \$10 per thousand, chimneys at sixty cents per linear foot, plastering at twenty-four cents per square yard, and to build a cistern for \$25. The carpenter work was contracted for with Elijah Arnold, for \$850. The house was built and finished some time in October, 1889. In the month of October, about the 29th, James O'Conner took a mortgage on the premises for \$1,000 duly executed by appellant Freeman as the mortgagor. On the 4th of January, 1890, the petition or claim for the mechanic's lien in the suit at bar was filed by the appellee, and the only issue of fact seems to be whether the labor and materials, a lien for which is sought to be obtained in this proceeding, was included in the contract of appellant with Elijah Arnold to build certain portions of the house.

The evidence appears to be somewhat conflicting upon this branch of the case, but the court below, on hearing, found that issue for the appellee (petitioner below) and found due him the sum of \$148.94 for labor and materials, and ordered and decreed that amount paid, etc., which was declared a lien, etc., and a sale of the premises to pay such lien and costs, the surplus arising therefrom, if any, to be first applied in payment of the mortgage, and the balance, if any there should be, to Freeman. To which finding, order and decree Freeman alone appeals to this court.

Appellant's counsel contends, first, that the mortgage to O'Conner became a lien upon the premises prior to the time of filing the petition by appellee, and was a lien superior to that of appellee; second, that the evidence does not support the decree; third, that the court erred in holding the lien of appellee prior and superior to that of the mortgage.

The first and third points above made, may be regarded as one and the same. In *Clark v. Moore*, 64 Ill. 273, it was held that the lien of the laborer or material man attaches at the time when the contract therefor is made. It is true that decision was made in the construction of the first section of the act in reference to "Mechanics' Liens" then in force, but we think it will apply with equal force to Secs. 1 and 2 of Chap. 82 Starr & C. Ill. Stats., which last named act

must control in the case at bar, the second section of which reads as follows: "Sec. 2. The lien provided for in sections 1 and 29 of this act, shall extend to an estate in fee, for life, for years, or any other estate, or any right of redemption or other interest which such owners may have in the lot or land, *at the time of making the contract.*" This was in substance the language of the former act. The same principle was announced in *Hickox v. Greenwood*, 94 Ill. 266, in which the several sections of the statute in question were considered and their effect determined. Second. We have carefully examined the record before us, and while the evidence upon the question of fact is somewhat conflicting, we are inclined to think that the Circuit Court was justified in its finding for the appellee upon the facts of this contention and in the amount so found to be due him, viz., \$148.94. We also think that as the contract for doing the work and furnishing the materials by appellee was prior in point of time to the execution, delivering and recording of the mortgage to O'Conner as mortgagee, the mechanic's lien was a prior lien to that of the mortgage. *Hickox v. Greenwood, supra; Clark v. Moore, supra.*

If we are correct in this view the decree of the Circuit Court was not erroneous, and should be affirmed.

Decree affirmed.

CITY OF ROCK ISLAND

V.

WILLIAM McENIRY.

Municipal Corporations—Action by City Attorney to Recover for Services Rendered outside County—Construction of Ordinance—Estoppel—Practice—New Trial—Sufficiency of Evidence to Support Verdict.

1. A court is not bound to grant a motion for a new trial because both parties may assent thereto.

City of Rock Island v. McEniry.

2. A city council has power to rescind a vote to pay a certain sum in settlement of a contested claim so long as such action of the council remains executory.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Rock Island County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. JOSEPH L. HAAS, for appellant.

Mr. J. T. KENWORTHY, for appellee.

UPTON, J. This action was assumpsit, brought by appellee for services claimed to have been rendered to and for the appellant by him while acting as the attorney of appellant, duly elected, in suits and business of the appellant city outside the county of Rock Island. It is conceded that appellee was duly elected as such city attorney, qualified for and acted as such during the time of the services for which he now seeks compensation, and that for and during the entire period of service the following ordinance of the appellant city was in force and effect, viz.: "The city attorney shall receive a salary of six hundred dollars per annum, and a reasonable compensation for professional services rendered in suits and business outside of the county of Rock Island." It is conceded that during appellee's incumbency of the office of city attorney of appellant city, several suits were pending in the Henry County Court, in which the appellant was plaintiff; that one suit was also pending and was determined in the Appellate Court of the Second District, in which the appellant city was a party, and one suit pending which was heard and determined in the Supreme Court to which appellant city was a party also. These several suits arose in reference to certain ordinances enacted by the municipal authorities of the appellant city regarding the construction and maintenance of an abattoir, or public slaughter-house, in the appellant city.

Appellee claims that he rendered the services here sought compensation for in his capacity as such city attorney for appellant in that litigation. Appellee in June, 1889, presented to the appellant city council, at a regular meeting

thereof, an itemized bill or claim for such services aggregating \$630, which was referred to the committee on claims of the council, which committee made report therein in favor of its allowance, but the claim was not allowed. Thereafter the city council took up and considered the claim on two occasions and upon each occasion refused its allowance. In November, 1889, a special committee was appointed on the petition of appellee by the city council, to which the appellee's claim was referred for examination and report, which committee failed to find that any sum was due appellee, but reported that appellee would accept the sum of \$500 in full payment of his entire claim. The city council thereupon voted to allow appellee \$500 in settlement and compromise of such claim. On the next subsequent meeting of that council its former action allowing the claim was reconsidered and it refused to pay anything upon such claim. Appellee then claimed that appellant city, having voted to allow his claim at \$500, could not thereafter rescind its action; that its allowance constituted a settlement thereof, and he demanded a warrant for that amount, which was refused. This action on the part of the city council in rescinding its previous recited order, in voting to allow appellee \$500 as a compromise of his claim, was objected to by appellee when offered in evidence on the trial in the court below, but the court admitted the evidence and appellee excepted thereto and the case was then tried on a *quantum meruit*. There have been two trials. The first trial was with a jury resulting in a verdict for the appellee in the sum of \$475, which verdict being set aside, on motion a second trial was had, with a jury, and substantially under like evidence and rulings by the trial court, resulting in a judgment for the appellee in the sum of \$288; a motion for a new trial having been interposed by appellant, appellee confessed said motion in open court and the several causes in said motion assigned, but the trial court of its own motion overruled the same and rendered a judgment on the verdict, to which exceptions were taken by both parties, and the defendant below appealed to this court.

It is conceded that appellee held the office of city attorney for the appellant city from the spring of 1887 to the spring

of 1889. Appellant's counsel here ask our consideration and determination of the following questions as proposed by it:

First. Does the ordinance recited apply to the case presented by appellee?

Second. If so, did he render such service?

Third. If so, were the interests of appellant subserved thereby?

Fourth. Conceding an affirmative answer to be given to each of the foregoing questions, what are such services reasonably worth?

The first question propounded is one of law, to which we answer, that, in our judgment, the case made by the evidence in this record is within the letter and spirit of the ordinance providing for a reasonable compensation to its city attorney (appellee) for professional services rendered in suits and business outside the county of Rock Island over and above the amount of the salary of such attorney of \$600.

The other questions are entirely questions of fact, and if the evidence in this record on the part of the appellee (plaintiff below) is sufficient to warrant the jury in their findings and in the verdict rendered, the judgment of the Circuit Court thereon ought not to be disturbed, the rule of law being that the verdict of a jury upon questions of fact alone, which have been fairly submitted, must stand, although it may appear to be against the weight of the evidence, unless it is apparent on the face of the record that the jury were actuated by passion or prejudice. *Shelton v. O'Riley*, 32 Ill. App. 640, and many other cases in this State to the like effect, not necessary to be cited.

From a careful examination of this record we are inclined to think the evidence supports the verdict. It is true that according to the testimony of the witnesses for the appellant the services rendered by appellee were of small value, not exceeding \$110; on the other hand, the appellee's witnesses place the value thereof at from \$500 to \$1,000. From all the evidence we are inclined to think that the witnesses for the appellant rather underestimated the value of appellee's services, and took rather a narrow view of their merit. Appellee was in these cases, as it appears, for some time asso-

ciated with other counsel, it is true. The case in the Supreme Court, it seems appellee took charge of, with other counsel which he employed; in view of the further fact that he personally attended in part to the case in this court we are inclined to think the jury were warranted in their finding, and that we would not be justified in interfering with the verdict rendered. But it is insisted that the trial court should have granted appellant's motion for a new trial, because both appellant and appellee *assented* thereto, and hence the trial court was in error in refusing a new trial. In other words, it is insisted as a matter of law and right that the courts of this State must allow a re-trial or rehearing in all cases where both parties agree thereto, and the courts before whom such cases are pending have no discretion in that regard. We are not prepared to yield or assent to that proposition. We think the court had full power to grant or refuse the new trial in the case at bar on the motion made therefor, *with or without the consent of either party, or even without any motion being filed by either party therefor, if satisfied that the ends of justice would be best subserved thereby, or required it to be done.* We regard that as one of the discretionary powers of the courts necessarily incident thereto for the furtherance of justice in judicial proceedings. Any other rule would be promotive of endless litigation, productive of little, if any, good, in our judgment.

The trial court did not err in holding that the appellant, by the vote of its council to pay appellee the sum of \$500 as a compromise of his itemized claim for \$630, were estopped from rescinding such vote at a subsequent meeting of its council. Its power to rescind former action continued so long as that former action remained executory; until that time it was, in effect, but a proposition for the settlement of appellee's claim, unexecuted, binding upon neither party, and subject to be accepted or rejected by either party. No complaint is made as to the giving, refusing or modification of instructions asked or given the jury on the trial, and finding no reversible error in this record, the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

Hanks v. The People.

JOSEPH J. HANKS

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Dram-shops—Sale of Liquor—Criminal Prosecution for—License Issued under Void Ordinance as Defense.

Where a license to sell intoxicating liquors is issued under an ordinance, regular on its face, purporting to have been passed by the board of trustees of the village, and signed by the village president and duly published, such license, when accepted and paid for in good faith, is a defense against a criminal prosecution for selling liquor, although the ordinance in question was not legally passed.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. GRIER & STEWART and CHARLES A. McLAUGHLIN, for appellant.

Messrs. EDGAR MACDILL, State's Attorney, and KIRKPATRICK & ALEXANDER, for appellees.

C. B. SMITH, P. J. This was an indictment against appellant under the "Dram-shop" Act. He was charged with selling intoxicating liquors in less quantities than one gallon. The defendant pleaded not guilty, and waived a jury, and a trial was had before the court by agreement, and the defendant was found guilty on sixteen counts, and fined \$20 on each count. From that judgment appellant prosecutes this appeal. There is no controversy about the facts. The following stipulation was made in the record, viz.:

"Stipulation that record should show that defendant admitted sixteen sales at time charged in indictment, and that sales were of liquor to be drank on premises, and were made in Roseville, Warren Co., Ills. That Roseville is a village incor-

porated under general law, and that sales were made in less quantities than one gallon and were intoxicating liquors."

It will be seen by this stipulation that the defendant admits making the sale as alleged in the indictment, but he insists that he had a lawful right to sell by virtue of a license duly issued to him by the corporate authorities of the village of Roseville. It was not denied by the people that the defendant did have a license in all respects formal, and that he had filed the bonds required by the village and the statute. The contention of the people is that the license was void. It appears that the village of Roseville attempted to exercise the power delegated to it, and on May 5, 1890, passed an ordinance providing for the granting of licenses for the sale of intoxicating liquors within the corporate limits of the village, which ordinance was duly signed by the president of the village board, attested by the clerk, copied into the book of ordinances of the village, and on May 9, 1890, duly published in the Roseville Times, a newspaper published and circulated in that village. The ordinance was regular on its face, purported to have been passed by the board of trustees of the village, and signed by the president; was published by authority, and was, at least *prima facie*, a valid ordinance and a valid law. The defendant made application for a license to keep a "dram-shop" under said ordinance, tendered his bonds to the village and State, which were accepted by the village authorities and are still retained by them; he paid the required license fee, which is still in the hands of the village, and thereupon there was issued to him under the hand of the president and clerk of the village board and under the corporate seal of the village, a license to keep a "dram-shop" within the village. He in good faith went into business under this license, and for sales made under it he is indicted, and has been found guilty by the court below on the ground that the ordinance was invalid, the license issued under it a nullity, and the sales made under the license illegal and criminal without regard to their intent.

It appeared from the evidence that the ordinance passed by the village authorizing the issuing of licenses to keep a dram-shop was not legally passed, it lacking one element required by law, when it was upon its passage, to make it a valid ordi-

Hanks v. The People.

nance. But this objection was not made to the validity of the ordinance by any of the village authorities, at the time, nor since that, so far as we are informed from this record. The ordinance was duly recorded, signed by the proper officers and duly published for the required time. It was under this ordinance that the license was issued to appellant, and it was under and by virtue of the license so issued that he sold the liquor for which he was indicted and convicted. There is no proof in the record to show that appellant had any knowledge of any infirmity or illegality in the ordinance, or that he was acting in collusion with the city officials to get a license, without being lawfully entitled to it. We find nothing in the record to impeach the good faith of appellant in taking out and paying for the license in question.

The only question presented, therefore, for our consideration in this record, is whether, under the admitted facts in the case, the appellant was criminally liable for selling intoxicating liquors. We think appellant was not liable. He had the license required by law and had executed his bonds, and so far as it was in his power he had complied with the law, and honestly supposed he had a lawful right to make the sales. He had a right to presume that the village authorities had followed the law in passing the ordinance in question, and publishing it. He was under no obligation to examine the records of the proceeding of the village board, and see whether they had followed the law in passing the ordinance. As well require every citizen of the State to know at his peril, or go and examine the journals of the General Assembly, to see whether the Constitution had been complied with in the enactment of laws before he could act under a law duly published in the statutes of the State, as to require every citizen of a city or village to go and examine the original proceeding of the council before he could act under an ordinance. We think it would be most unreasonable and burdensome to impose such duty upon the citizen in either case; and so it was held in *The People ex rel. v. Loewenthal*, 93 Ill. 191, that in the case of legislative enactments the citizen might rely upon and presume that the laws duly passed and published,

and purporting to have been duly passed, were legal and valid enactments. We think there is no distinction in principle between the rule being applicable alike to both cases. We do not hold, or intend to be understood as holding, that by indulging this presumption as to the regularity of the passage of an ordinance, that parties are thereby excused from being chargeable with a knowledge of the law in all cases, whether arising under an ordinance or statute. The presumption indulged of the regularity of the acts of the village council relates to the existence only of a fact, and not as to the meaning or requirement of an ordinance or law in actual existence. We think the evidence here entirely fails to show any criminal conduct on the part of appellant, or any purpose to violate the law, or that he had any knowledge that he was violating it; and we think it would be a violation of every principle of the criminal law to convict a man under such circumstances. The village took appellant's money for his license, and have kept it, and never offered to return it.

In the case of *The People v. Mettler*, opinions filed at Ottawa, November 26, 1890, the defendant was indicted for cutting down certain trees in a cemetery in violation of the statute and appropriating them to his own use. The cemetery was incorporated and under the control of a board of directors, who only could act in their corporate capacity. The defendant alleged in his defense that he did the act under the advice and consent of the individual members of the board, and for the purpose of improving and bettering the condition of the cemetery. It was objected that he could not lawfully get the consent of the corporation to do the act complained of, by mere individual action of separate members of the board, and he was not allowed to show on his trial that he acted upon their advice and in good faith without intending to violate the laws or do any wrong. On appeal to the Supreme Court it was held the evidence was competent to show the absence of a criminal purpose, and to show that he supposed in good faith he was justified and authorized to do what he did in fact do, although it might afterward appear that the parties who directed him to cut the trees were not

Wilson v. Challis.

acting within the requirements of the law so as to confer legal authority on Mettler to cut the trees.

We think the principle announced in that case applies to and covers the one at bar. We are therefore of opinion that the conviction of appellant was wrong, and that the finding and judgment of the court was contrary to the evidence and the law, and the judgment will be reversed and remanded.

Reversed and remanded.

JOHN T. WILSON
v.
JAMES T. CHALLIS.

Sales—Rescission for Fraud—When Vendor Excused from Placing Vendee in Statu Quo.

The rule that a vendor can not rescind a sale on the ground of fraud without placing the vendee in *statu quo* is subject to exception, where the vendee has by his own acts put it out of the power of the vendor to place him in *statu quo*.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Livingston County; the Hon. N. J. PILSBURY, Judge, presiding.

Messrs. MOLLDUFF & TORRANCE and D. L. BISHOP, for appellant.

Mr. GEORGE W. PATTON, for appellee.

C. B. SMITH, P. J. This was a replevin suit by appellee against appellant, who was sheriff of Livingston County, to recover a lot of boots and shoes which appellee claimed. The material facts out of which this controversy arose are substantially as follows: Harris, John and D. Rosenthal are three brothers, and all of them dealers in clothing. Harris Rosenthal

lives in Indiana, John and D. Rosenthal live in Livingston County, Illinois, and John carried on a store in Cullum, but carried it on in the name of his brother D. Rosenthal. James T. Challis through his traveling salesman made sales of goods from time to time to John Rosenthal, but without knowing he was dealing with John. John always represented himself as D. Rosenthal, and carried on the store in that name and represented himself as being D. Rosenthal. At various times when these goods or parts of them were bought, John represented that he was making money and owed little or nothing, and in order to induce appellee to think he was carrying a large stock, he had his shelves all filled with empty shoe boxes, with but a single pair of shoes, with one of them hanging outside the box. John informed appellee's agent that he owned the store and owed but a small amount, and by deceitful practices and falsehood obtained the goods which are the subject of this suit. In point of fact D. Rosenthal had no interest whatever in this store nor in the stock of goods, nor had ever bought them. While some of these goods, so fraudulently obtained from appellee by John Rosenthal were still in the store, Harris Rosenthal obtained a judgment against his brother D. Rosenthal, and had an execution put in the hands of the sheriff, and levied upon the goods in question as the goods of D. Rosenthal, but which were in fact in the possession of John Rosenthal. Appellee having discovered the fraudulent practices of John in getting these goods under his brother's name, and upon false and fraudulent representations of his ability to pay and the amount of his stock, thereupon replevied the remnant of goods from the sheriff. A trial was had and resulted in a verdict and judgment for appellee. Appellant brings the record here and assigns various errors. The chief contention on the part of appellant is based on the claim that appellee could not rescind the sale for fraud unless he could get hold of all the goods obtained from him, or unless he restored John Rosenthal to his original position by refunding what money he had paid on some of the goods. While the general rule undoubtedly is that a seller can not rescind a sale without putting the buyer in *statu quo*, still this

Huber v. Schmacht.

rule has its exceptions and the case before us illustrates it and furnishes an example. In this case the purchaser has put it out of the power of appellee to restore the parties to their original condition. He has sold a part of the goods, and received the money for those sold. The fact that appellee can not find all the goods obtained from him fraudulently, is no reason why he may not take such as he can find. We think the jury was justified, under the evidence in this case, in finding that John Rosenthal obtained these boots and shoes fraudulently from appellee and that the verdict was right. It is also urged as error that the court erred in giving the fourth and fifth instructions for appellee. While these instructions have no evidence to support their assumptions, still, it did appellant no harm to give them, for the reason that it is certain from the evidence that D. Rosenthal had no interest or ownership whatever in the goods, and the giving these instructions, though without evidence in their support, could do appellant no harm. Finding no reversible error in the record, the judgment is affirmed.

Judgment affirmed.

IGNATZ HUBER

V.

HERMAN SCHMACHT.

Practice—Question of Fact—Effect of Verdict.

This court is not authorized to set aside a verdict where no question of law is involved, unless the verdict is clearly against the weight of evidence.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Rock Island County;
the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. E. H. GUYER and ADAIR PLEASANTS, for appellant.

Mr. JOSEPH L. HAAS, for appellee.

C. B. SMITH, P. J. This was a suit brought on a promissory note for \$250 executed by Herman Schmachl to appellant, Huber. Huber claimed that there was still due and unpaid, \$150 on the note. Appellee set up the defense of payment of the note in full, and also filed a counter claim against appellant for repairs and money paid on account of appellant. The case was tried before the court and a jury, and the jury rendered a verdict in favor of appellee on his offset, and assessed his damages at \$75.65. The court overruled a motion for a new trial, and gave judgment on the verdict. Appellant brings the case here on appeal, and insists that the verdict and judgment are against the evidence. No other question is presented. An examination of the record shows that the evidence upon the payment, as well as upon the counter claim or set-off of the defendant, was sharply conflicting. Under the evidence the jury might have found either way, and there would have been evidence to support such a finding. It was for the jury to say who of these witnesses were most worthy of belief. We can not say they were mistaken, or that they erred in their judgment.

Before we are authorized to set aside a verdict we must be satisfied that it is clearly against the weight of the evidence. We are not so satisfied in this case, and the judgment will be affirmed.

Judgment affirmed.

EMIL WESTPHAL

V.

ALBERT AUSTIN, BY NEXT FRIEND.

Dram-shops—Injury to Plaintiff's Means of Support—Evidence—Causation—Practice—Instructions.

1. In an action brought by a minor by next friend, under the Dram-shop Act, to recover for alleged injuries to plaintiff's means of support by reason

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Westphal v. Austin.

of defendant's sales of intoxicating liquor to plaintiff's father, thereby causing the death of plaintiff's father, *held*, first, that the evidence failed to show that the death of plaintiff's father was caused by the sales of liquor shown, and second, that the evidence did not sufficiently show that plaintiff had suffered in his means of support through the death of his father.

2. Where the instructions complained of are not abstracted, this court will not consider the objections made thereto.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Whiteside County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Mr. J. E. McPHERRAN, for appellant.

Mr. J. D. ANDREWS, for appellee.

UPTON, J. This is a suit under the Dram-shop Act, brought by appellee, a minor, by his next friend, against the appellant. The declaration contains two counts. The first count alleges that appellee was the son of one Martin V. Austin. That prior to January, 1880, the father had carried on and successfully conducted business at Morrison, in Whiteside county, and had furnished and until that time had provided for the appellee a comfortable support. That between the date last aforesaid and December, 1885, the time of his death, appellant sold Martin V. Austin intoxicating liquors at his saloon in Morrison, and thereby caused him to become a habitual drunkard and to squander his property, become impoverished and physically ruined, and unable to provide for the support of the appellee by means thereof, etc. The second count is in substance the same as the first, with the additional allegation that in consequence of appellant's wrongful sale of intoxicants to the father of appellee, he became diseased and disordered and from the effects thereof died, etc. In brief, appellee's claim for damages rests upon the allegation, first, that the appellant caused the father of appellee to become a habitual drunkard, thereby injuring appellee's means of support; and second, that by the same means appellant caused the father's death, and thereby injured his means of support.

A plea of the general issues was interposed, and joinder thereon. The case was heard in the trial court before a jury and a verdict returned for appellee in the sum of \$300, upon which judgment was rendered, after overruling a motion for a new trial, and the case was brought to this court on appeal.

It is here objected on the part of appellant—first, that the trial court erred in giving certain instructions on behalf of appellee; second, that the trial court erred also in the exclusion of evidence offered by the appellant; and third, that the trial court committed further error in refusing a new trial on appellant's motion therefor, for the alleged cause that the evidence does not support the verdict.

First. As to the instructions complained of we need only say, that the instructions are not abstracted, and we are not required to look into the record to ascertain what they are. The rules of this court require that a complete abstract be made of that portion of the record, at least, upon which error is assigned, so that the court therefrom may see to what the objection is taken. Such was the holding of the Supreme Court under its rule of practice which was adopted by this court upon its organization, and since followed, and from which we do not at present feel at liberty to depart. *Shackelford v. Bailey*, 35 Ill. 388; *Johnson v. Bantock*, 38 Ill. 114; *Israel v. Town of Whitehall*, 2 Ill. App. 509; *Hanchett v. Riverdale Drainage Co.*, 15 Ill. App. 65; *Village of Chatsworth v. Ward*, 10 Ill. App. 77.

Second. Upon careful examination we think the trial court committed no error in the exclusion of the evidence complained of as rejected.

Third. The important question in the case, as we regard it, remains to be considered, viz.: does the evidence support the verdict? It seems established by the evidence that at the time of his father's death, appellee was nearly eighteen years of age; that prior to the year 1880 the father had been engaged in farming. In that year he abandoned that pursuit, removed to the village of Morrison, and there engaged in the business of buying and selling stock. For some years before he discarded agricultural pursuits, the father had been accus-

Westphal v. Austin.

tomed to drink intoxicating liquors to excess; but for how long a time prior thereto does not appear. It does appear that prior to 1880 the father had drank intoxicating liquors at the appellant's saloon on several occasions. Some time in the early part of the year 1882, appellee, having had some trouble with a servant of appellant in reference to his drinking, and of his being upon the public streets in an intoxicated condition, appellant, in the language of the witness, placed Martin V. Austin upon the black list at his saloon, and from thence until his death in December, 1885, Austin neither obtained nor drank intoxicating liquors at appellant's saloon, with one exception of a single glass in December, 1882, as shown by the evidence, and as to that there is a sharp conflict in the evidence. It further appears that the father of appellee was well adapted to the business in which he was engaged, and that his habits of drinking were not observed to have had any marked or deleterious effect upon his capacity for business or in the amount of the business done prior to 1882. Some of the witnesses called for appellee, among whom were those who had been engaged as copartners with appellee's father until about one year prior to his death, testified in substance, that prior to 1882 his business habits were good. It appears that there was no change in the general health or appearance physically of the father of appellee from 1881 until just before his death, although for the last year in his life he was not engaged in business. Hannah M. Austin, the mother of appellee, testified that her husband, Martin V. Austin, died December 3, 1885, having been sick but six weeks preceding his death. That prior to the last year of her husband's life, the character of the support of his family was good, and that she and her husband kept house together from April 6, 1863, until his death. The physician who attended the father of appellee in his last sickness, testified that the father was afflicted with the dropsy, caused by a trouble of the liver; the disease of which he died was called scirrhus of the liver. He lived about four weeks after the doctor commenced to treat him. The doctor had known the father since 1882, and had seen him intoxicated, and he thought his death was

caused by his general habits and the excessive use of alcoholic spirits. Upon cross-examination the doctor stated further that the disease of which the father died manifests itself when there is no drunkenness or drinking habit at all, in children of tender years, and in women. This dropsical condition is produced by the retarded action of the heart; any thing which retards the action of the heart would induce a dropsical condition; this dropsical effusion may be found in the system when there is no alcoholic poison or stimulant whatever present. The doctor further stated: "I do not swear that the cause of this man's death was the excessive use of liquors or alcoholic stimulants." In brief this was substantially the extent of the testimony offered by appellee upon the points now under consideration, and it was not strengthened by any evidence offered by the appellant upon these points.

In *Flynn v. Fogarty*, 106 Ill. 263, which was an action of the wife to recover for the death of her husband, under the statute now in question, it was there held that to entitle the plaintiff to recover it must be shown by the evidence, first, that the defendant sold or gave the intoxicating liquors which produced the effects complained of, to the person alleged to have become intoxicated thereby; second, that such liquor caused the intoxication complained of in whole or in part; third, that such intoxication caused his death; and fourth, that by reason thereof the plaintiff has been injured in his means of support.

It does not appear from the evidence of the appellee, with no contravening testimony, that the liquor sold to the father of appellee three years preceding his death, or at any other time, was in fact or legal presumption the proximate cause of the father's death. That cause is shown to have been a disease of the liver, induced by the retarded action of the heart, and not dependent upon the use of alcoholic stimulants, either in whole or in part. After a careful examination of all the facts and circumstances, as shown in the record before us, which we have carefully studied, we think the evidence and circumstances in evidence are entirely too remote, weak and

inconsequential to connect the appellant with the sale of intoxicating liquors to the father of appellee so as to charge the appellant, in a legal sense, with producing the habitual intoxication of the father of appellee as charged in the declaration, or which did, in fact, lead to cause the affection of the liver of which the father died, or cause his death.

The evidence fails to show in any manner to what extent, if any, the appellee was or could be injured in his means of support by the father's death, nor does the evidence or circumstances in evidence furnish any substantial data, fact, circumstance or legal hypothesis upon which to estimate damages to appellee, even if it be conceded that the father's death was caused by appellant, as alleged. Appellee at the time of his father's death was eighteen years of age, and presumably capable of supporting himself. Nothing appears in the evidence in this record that the appellee was receiving any support from the father at the time of his death, or that he was needful of any, aside from his own efforts. How, then, was appellee damnified, in a legal sense, by his father's death? It is insisted, however, that proof of the father's death, caused by the wrongful act of the appellant, warrants the legal inference of injury to the means of support to his minor children, and consequent damages to them therefor. If this contention was conceded for the sake of the argument, it could not extend beyond nominal damages, and serve to shift the burden of proof to the defense, as was held in *Flynn v. Fogarty, supra*. But that case was a suit by the wife for the loss of her husband, and clearly distinguishable from the case at bar; besides, it was expressly held in that case that such legal inference can not be indulged, except in those cases where it is shown—first, that the defendant sold or gave intoxicating liquor to the husband; second, that such liquors caused the intoxication complained of; and third, that such intoxication caused his death; neither of which two last named precedent facts, as we have seen, were shown in the case at bar, which we must regard as quite sufficient to answer this contention.

It is further claimed on the part of appellee that as the actual damages in this class of cases can not be shown with

certainty, it must be left to the jury to be determined by inferences, etc. Inferences from what, it may be asked? Most certainly from the facts and circumstances in evidence only, and in the case at bar the facts and circumstances from which to draw the inferences are wholly wanting.

The rule is clearly stated in the case last above cited. It is there said: "It was highly proper to show what the deceased himself had done in his lifetime, the character of his business, his habits of industry and thrift, income, and all that sort of thing, with a view of determining what he probably would have done in the future. Since it could not be known with certainty what he would in fact have done or accomplished but for his death, the next best thing was to show the aid and assistance he probably would have rendered but for his death. Measured by what he had done or rendered in his lifetime, that could only be done in the manner before indicated," etc.

The evidence in the record before us discloses the age of appellee at the time of his father's death, but whether he was a member of his father's family, in whole or in part supported by the father, or what aid or assistance, if any, he had received or was then receiving from his father, or what, if any, means the father possessed with which to support or aid the appellee, does not appear.

If we are correct in the premises stated, clearly there can be no recovery in the case at bar. Manifestly the evidence is not sufficient to support the verdict, and the Circuit Court erred in refusing a new trial and rendering judgment on the verdict. The judgment of the Circuit Court is therefore reversed, and the cause is remanded for further proceedings not inconsistent with the views herein above expressed.

Reversed and remanded.

Burnett v. Snapp.

I. BURNETT

V.

H. SNAPP.

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Practice—Bill of Exceptions—Must Show Motion for New Trial.

A recital in the judgment, by the clerk, that a motion was made for a new trial, is a nullity. The fact that such motion was made must appear in the bill of exceptions signed by the judge.

[Opinion filed June 11, 1891.]

IN ERROR to the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. HALEY & O'DONNELL, for plaintiff in error.

Mr. H. M. SNAPP, for defendant in error.

C. B. SMITH, P. J. This was a suit begun before a justice of the peace and brought to the Circuit Court by appeal. The suit was to recover for a month's rent for a certain house after appellant had abandoned it and moved away. Appellee had judgment below, and appellant now brings the record here on appeal. The bill of exceptions show no motion for a new trial nor any exception to the judgment. The recital in the judgment by the clerk that a motion was made for a new trial amounts to nothing. It must be in the bill of exceptions and signed by the judge. There is, therefore, nothing for us to review. *Martin v. Foulk*, 114 Ill. 206; *Wolfe v. Campbell*, 23 Ill. App. 483.

The judgment will be affirmed.

Judgment affirmed.

ASA B. SMITH

V.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL.

Drainage—Removal of Commissioner from Office—Quo Warranto.

Drainage commissioners are public officers who may, in proper cases, be ousted by *quo warranto*. The Legislature has the power to alter or repeal the drainage law and may provide for the removal of one set of officers and for the appointment of another set in a different mode.

[Opinion filed June 11, 1891.]

IN ERROR to the Circuit Court of Lee County; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. F. E. ANDREWS, for plaintiff in error.

Messrs. SHERWOOD DIXON and S. H. BETHEA, for defendants in error.

C. B. SMITH, P. J. This was an information in the nature of a *quo warranto*, brought for the purpose of ousting appellant from the office of drainage commissioner of Nelson Drainage District No. 1. On the hearing in the Circuit Court a judgment of ouster was rendered against appellant and the case is brought here on a writ of error.

The drainage district in question was organized by proceedings had before a justice of the peace under the act of May 29, 1879. Appellant was duly appointed by a justice of the peace October 8, 1883, and took and subscribed the required oath and entered upon the discharge of the duties of his office. The act of 1879 was amended in 1885. The 62d section of the amended act required the County Court to appoint the drainage commissioners on the first Monday in September, 1885, for any district before that time organized. By virtue of this power and authority vested in the County Court, the court did appoint three commissioners for the Nel

Smith v. The People.

son Drainage District to take the place of Asa B. Smith and his associate, who had been appointed by the justice. These new commissioners were qualified and demanded the office of appellant, who declined to surrender the office, and thereupon this proceeding was begun against him. On a hearing the Circuit Court gave a judgment of ouster and appellant now prosecutes this writ of error. His first contention is that the office of drainage commissioner is a mere private office or employment in which the State or public has no concern, and that *quo warranto* will not lie. It is also insisted that the charter to a drainage district is in the nature of a private grant, and that the Legislature can not repeal or alter it since it becomes a contract between the district and State. Much time is given by the learned counsel to the discussion of that question. We can not concur in either position. Drainage districts under the statute are creations for public as well as purely private purposes. It is a *quasi* public corporation and its commissioners are public officers with no private rights involved and may be superseded or removed from office. *Com. of Havana Tp. Drainage District v. Kelsey*, 120 Ill. 482. *People v. Brown*, 83 Ill. 95. These corporations are created by the statutes for sanitary as well as purely drainage purposes, and their creation, management and control are provided for by the statutes. This being so it follows that the Legislature has the power to at any time alter the law, amend or repeal it, and may provide for the removal of one set of officers, and for the appointment of others in a different mode. The 62d section of the act of 1885 authorized the County Court to appoint new commissioners in all old districts on a certain day. That was done in this case and the effect of the new appointment was to vacate the office held by appellant, Smith. *Peterson v. Lawrence*, 20 Ill. App. 637.

Finding no error in this record the judgment is affirmed.

Judgment affirmed.

THE COUNTY OF MCHENRY

V.

THE TOWN OF DORR.

Municipal Corporations—Suit by County to Recover from Township for Support of Pauper—Residence—Money in Possession of.

1. The mental capacity of a pauper and insane person after being adjudged insane, to choose a residence, can be shown in the absence of a readjudication.

2. In an action by a county to recover from a township for the care and support of a pauper during certain periods, this court holds that notwithstanding said person had been adjudged insane, he had, when subsequently discharged, the legal capacity to choose his residence, and having chosen one outside the defendant, it is not liable for his keeping from the time he was taken charge of by the county the second time.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of McHenry County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. A. B. COON and A. W. YOUNG, for appellant.

Counsel for appellee insist that the only effect of the verdict of August 15, 1882, finding Perry Spooner insane, was to change the presumption from one of sanity to one of insanity, and that the question might be rebutted after that by any evidence, and cite *Lilly v. Waggoner*, 27 Ill. 395, to sustain their position; but which case, when considered, does nothing of the kind; it merely finds that a conveyance executed *several years before* the inquisition of insanity was valid; and they only say, *obiter dicta*, "But after inquest found the presumption is reversed until it is rebutted by evidence that he has become sane." They do not say *what* evidence would be admissible, nor was that question before the court; they certainly do not hold that the question can be inquired into collaterally. *Menkins v. Lightner*, 18 Ill. 282, is also a case wherein a contract made *before* inquisition is passed upon, and the authorities there cited refer to contracts made after insanity is established by *proof*,

not where one has been judicially determined to be insane. And so as to the case of C. W. D. R. R. Co. v. Mills, 91 Ill. 39. And so also is Titcomb v. Vantyle, 84 Ill. 371, where the condition of the person a year *before* the inquisition of insanity was in question, and determined by oral evidence. There is nothing in that as to his condition after judicially declared insane, and no direct holding or opinion of the court as to the presumption after inquisition, what is said and quoted being simply *obiter dicta*.

The case of Langdon v. People, in 24 N. E. 874, is not a parallel case, as counsel for appellee seem to insist. In that case Langdon had never had an inquisition of insanity or been judicially found insane. He had simply at one time been confined in an insane asylum and transferred from the penitentiary by the warden's direction. The court say, on page 879: "Therefore, in considering the views hereinafter expressed, it must be borne in mind that the bare fact of the defendant's transfer from the penitentiary to the insane hospital in 1878 or 1879 is the only evidence of the unsoundness of his mind when he was so transferred." And again on page 880: "In the present case there is no proof whatever that the defendant was adjudged to be insane in accordance with the provisions of the act in relation to the commitment and detention of lunatics. Rev. St. C. 85." Again: "The removal is not based upon insanity that is determined by an inquest or legal adjudication, but because the attending physician or warden advises it."

The Indiana case cited from, 22 N. E. 110, only reaffirms the doctrine previously laid down by that court in Redden v. Baker. The court say (p. 111): "In the case of Redden v. Baker, 86 Ind. 191, it was held that where a person had once been adjudged insane by a proper tribunal, that the presumption of insanity continued until such person had been declared sane under the proceedings provided for by our statute, and that, while the record of insanity stood, such person was incompetent to enter into any contract. Such is undoubtedly the rule where there are no counter-presumptions. * * * But in cases like this, involving the legality of a marriage, every presumption is in favor of such marriage." And they

say that "it can not be tried like ordinary questions of fact which are independent of this presumption." Evidently making this apparent modification of the rule in *Redden v. Baker*, on the ground of public policy, which is over and above all cases and the foundation of all rules and laws.

In a criminal case the rule is different because the law makes insanity a defense which can be inquired into in the same proceedings, but in a civil case the presumption is conclusive in a collateral proceeding such as this.

As before stated, the case of *Redden et al. v. Baker*, 86 Ind. 191, is a judicial construction of a statute almost identical with our own—Par. 37, Chap. 86—in providing for the trial of a person who has been declared insane and whom it is alleged has been restored to reason, as they put it—has become of sound mind again; and the principle there enunciated that the sanity, soundness of mind, or restoration to reason can only be established and shown in the manner pointed out by the statute, is exactly what we contend. Our statute points out a way of determining this fact, even if a person has no property or conservator—Par. 20, Chap. 85—and we insist that until *Perry Spooner* was judicially declared restored to reason by one of these processes, that the presumption of insanity was conclusive and could not be inquired into or attacked collaterally.

Messrs. C. P. BARNES and JOSLYN & CASEY, for appellee.

"As this court said in *Wood v. Price*, 46 Ill. 435, so must we now repeat in a case tried by the court without a jury, in which the court was required to weigh all the testimony—as much force and effect should be given to the finding of the court as to the finding of a jury. The circuit judge is in a more favorable position to weigh the evidence than we can be, and his finding not being against the preponderance of the evidence, it must stand." *Thomas v. Rutledge et al.*, 67 Ill. 213; see also *Wood et al. v. Price*, 46 Ill. 435; *Claybaugh v. Hennessy*, 21 Ill. App. 124; *Dempsey v. Whiteside*, 31 Ill. App. 32; *Field v. The Chicago & Rock Island Railroad Co.*, 71 Ill. 458; *Travers et al. v. Wormer et al.*, 13 Ill. App. 39.

“The court saw and heard the witnesses, and very great deference should be paid to his judgment in relation to a question upon which the evidence is sharply conflicting.” *People v. Brooks*, 22 Ill. App. 594. See also *Claybaugh v. Hennessy*, 21 Ill. App. 124.

“The legal presumption is, that all persons of mature age are of sane memory, but after inquest found, the presumption is reversed until it is rebutted by evidence that he has become sane.” *Lilly v. Waggoner*, 27 Ill. 395; see also *Menkins v. Lightner*, 18 Ill. 282; *Chicago W. D. R. Co. v. Mills*, 91 Ill. 39; *Titcomb v. Vantyle*, 84 Ill. 371.

“When insanity of a permanent type is shown to have existed prior to the commission of an act, it will be inferred to have continued, unless the contrary be proved, down to the time of the act. It is otherwise, however, when the proof is of temporary or spasmodic mania, or of delirium tremens.” *Wharton’s Criminal Law*, 9th Edition, Vol. 1, Sec. 63, p. 89.

“As a general rule, where insanity is proven as existing at a particular period, it will be presumed to continue until disproved. 1 *Greenl., Ev.*, Sec. 42; 2 *Bish., Crim. Proc.*, Sec. 674; 1 *Wharton’s Crim. Law*, Sec. 63. This rule, however, is subject to several important qualifications. One of these qualifications is that the insanity shown to have existed prior to the commission of the act must be of a permanent type, or of a continuing nature, or possessed of the characteristics of an habitual or confirmed disorder of the mind, or its peculiarities must have been exhibited for a long series of years. It is not sufficient that there be proof of a temporary or spasmodic mania. *Hix v. Whittemore*, 4 *Metc.* 545; *State v. Lowe*, 93 *Mo.* 547; 5 *S. W Rep.* 889; *People v. Francis*, 38 *Cal.* 183.” *Langdon v. The People*, 24 *N. E. Rep.* 874; see, also, *Physio-Medical College v. Wilkinson et al.*, *Supreme Court of Indiana*, 9 *N. E.* 167.

“If he was sufficiently recovered to be discharged, whether on parol or otherwise, it would seem that the presumption of his insanity, arising from his being in the asylum, ought to cease.” *Langdon v. The People*, *supra*.

“Inquisitions of lunacy are necessarily *ex parte*, so far as concerns the person claimed to be a lunatic; since, on the assumption by which alone they have validity, he is a lunatic, and, if a lunatic, he is not capable of putting in a valid appearance. Unless upon the hypothesis that such proceedings are *in rem* they can not be held admissible against strangers; and, at the best, make out only a *prima facie* case.” Whart., Crim. Ev., Sec. 599; also, Whart. on Ev., Sec. 599.

“It matters little whether the propositions the court refused contain correct expressions of the law or not. It is sufficient if it clearly appears the propositions which the court held to be correct state every possible principle of law necessary to be considered in the decision of the case. Other propositions were wholly unnecessary, and the court was not bound to hold them to be the law.” *The Germania Fire Insurance Company v. Hick*, 125 Ill. 361.

“The term ‘residence,’ mentioned in this act, shall be taken and considered to mean the actual residence of the party, of the place where he was employed, or, in case he was in no employment, then it shall be considered and held to be the place where he made it his home.” Starr & C. Ill. Stats., Chap. 107, Sec. 17, Subject, “Paupers.”

LACEY, J. The appellant seeks to recover of appellee for the care and support of the pauper, Perry Spooner, during periods between August 15, 1882, and September 6, 1887, charging that such care and support was furnished at the solicitation and request of the appellee.

It appears that according to the statute, the poor of McHenry County are required to be supported by the various towns in the county in which they reside six months immediately preceding the time they become a county charge. Perry Spooner, in accordance with the provisions of the statute, was on the 15th of August, 1882, tried in the County Court before a jury, and found to be insane and a county charge. The county from that time supported him as a county charge until about the 9th of October, 1882, when without any other proceedings before a jury to declare him

restored to reason, he was discharged as sane, and was allowed to go at large and support himself until July, 1884, when he was again taken into custody by the county as an insane pauper and supported up to the time this suit was commenced. During this time Spooner made his home with one E. P. Grover, in the town of Greenwood in said county, being employed as a farm hand, at wages of \$18 and \$20 per month.

The case was tried by the court without a jury, resulting in a finding by the court for the appellee, from which and the judgment thereon rendered, this appeal is prosecuted.

The right of the appellant to recover in this case hinges on the fact as to whether or not Perry Spooner was a resident of the town of Dorr for six months prior to July, 1884, the time he was taken into the custody of the county the second time; for as to the short time he was kept the first time by the county, we think the court below was fully justified in finding that the \$57 possessed by Spooner at the time he was found to be insane and a county charge, and which was taken into custody by the county, and held and returned to him by the sheriff when he was discharged in October, 1882, was amply sufficient, if it had been retained, to pay for his keeping up to that time. The county, having failed to apply it, can not recover the amount from appellee. If Perry Spooner was a resident of the town of Greenwood from October, 1882, to July, 1884, then, as a consequence, he was not a resident of appellee during that time.

As a question of fact, independent of any question of law, we think there was ample evidence from which the court might find that Spooner had sufficient mental capacity to choose a residence, and that in fact he did choose his residence in the town of Greenwood soon after he was discharged in October, 1882, and retained it till he was again taken into custody in July, 1884.

He had all the appearances of a sane man and was able to labor and earn his own living as well as any other farm hand; he was capable of handling a team and doing any ordinary work. But it is insisted that the judicial determination of Perry Spooner's insanity in August, 1882, was, until he by a

like decision should be declared sane, conclusive evidence of his insanity and that in consequence the question was not open to controversy. His status, therefore, being fixed, he was incapable of choosing a residence in the town of Greenwood.

The court below was, therefore, asked to hold the following proposition as law, which it refused to do, viz.: "That the verdict of the jury in insanity proceedings in this State, regularly had, is conclusive as to the question of insanity and can not be rebutted collaterally, nor be inquired into until such a person has been declared restored to reason, either by trial by jury, judgment on writ of *habeas corpus*, or discharge by the superintendent or keeper of an insane asylum as restored."

We are unable to agree with counsel for appellant on the proposition of law. We think, at least, the mental capacity of the pauper and insane person after being adjudged insane to choose a residence, can be shown in the absence of any readjudication.

The mental capacity of such person to commit a crime may also be shown, and we think in this State generally. The appellant relies largely on the case of *Redden v. Baker*, 86 Ind. 191, to sustain him in his contention. We have examined that case carefully and do not think that it can be regarded as authority in this State. That decision was rendered on a statute very different from ours. In that case Martha Collier had been declared insane under a statutory proceeding in the State of Indiana, and a guardian appointed, who was afterward discharged; but she had never been again tried as to her soundness of mind and restored to reason in the "same manner as to the allegation of the unsoundness of mind" as the statute required. After she had been declared of unsound mind, and after the discharge of the guardian and after she had married a man by the name of White, she sold and conveyed for a valuable consideration certain real estate to Redden. The action was brought to set aside the conveyance, which the Supreme Court of that State held should be done. The decision was based on a statute of that State. The court says: "The question is a new one and must probably be determined as a question of statutory construction rather than purely by principle or authority alone."

County of McHenry v. Town of Dorr.

The statute on the subject required the forming of an issue and trial by jury, and in case of finding the person tried of unsound mind, the appointment of a guardian, who should have the custody of the person and management of the estate, and the guardianship should terminate upon restoration to reason or the death of the ward. Sec. 10 of the statute also provided that "whenever it is alleged that such person of unsound mind has become of sound mind again, the fact may be tried as to the allegations of the unsoundness of mind." Sec. 11: "Every contract, sale or conveyance of any person, while a person of unsound mind, shall be void."

In our statute there is no such provision as to restoration as in the Indiana statute; nor is there any question here as to the property rights of Perry Spooner. The only question here is as to his mental capacity to choose his own residence after being discharged by the county authorities as of sound mind. The law favors the right to choose a residence, for it is always desirable that every person shall have a residence and a fixed place of abode. It is a matter that concerns the public in the individual's relations to society, in a similar way that his conduct and behavior affect it. It might as well be contended that an individual under like circumstances, however sane he might be in fact, could not commit crime until he was tried and again found sane. We understand that the Supreme Court has passed on this question substantially.

It is said that "the legal presumption is that all persons of mature age are of sane memory, but after inquest found the presumption is reversed until it is rebutted by evidence that he has become sane." See *Lilly v. Waggoner*, 27 Ill. 395; *Menkins v. Lightner*, 18 Ill. 282; *C. M. D. R. Co. v. Mills*, 91 Ill. 39; *Titcomb v. Vantyle*, 84 Ill. 371; *McCormick et al. v. Littler*, 85 Ill. 62; *Langdon v. The People*, 24 N. E. R. 874. In the case above cited, in 85 Ill., it was held that a contract for necessities, even if a person were under a conservator, under the statute, where all his contracts are declared void, was binding and not within the statute. Is a residence not necessary when a supposed sane person, formerly a lunatic, like Spooner, has been discharged by the county and turned

out to shift for himself? In *Langdon v. People, supra*, it was said by the court: "If he was sufficiently recovered to be discharged on parol or otherwise, it would seem that the presumption of his insanity arising from his living in the asylum ought to cease."

We are therefore of the opinion, that, notwithstanding that Spooner had been adjudged insane, he yet, when discharged, had the legal capacity to select his residence, and having chosen one outside the town of Dorr, the appellee is not liable for his keeping from the time he was taken charge of by the county the second time. The judgment of the court below is therefore affirmed.

Judgment affirmed.

39 248
47 169

B. H. MARTIN ET AL.

V.

GEORGE M. JAMISON ET AL.

Injunctions—Schools—Improper Payment of Public Money—Jurisdiction—Practice.

1. A bill averring that a majority of the directors of a school district, defendants, intended by fraud and indirection to pay out the public money to that district belonging, through an incompetent person named, who was by them employed as a teacher, to an assistant teacher, in fact the principal of the school, and who, at the time of such alleged employment, held no certificate as a teacher, makes a case for equitable jurisdiction.

2. In such case, equity will restrain the payment of any of such public moneys for such unlawful, and for any fraudulent purpose, to any one, by the board of directors of such district.

3. Equity once having obtained jurisdiction, will retain it until complete justice is done, even though adequate relief can be reached only by a personal judgment.

4. The dissolution of a preliminary injunction can not affect the ordinary progress of a suit in equity, it being collateral to the main object of the bill.

5. In the case presented, this court holds that the trial court erred in dismissing complainant's original and amended bills for want of equity; likewise in sustaining defendant's demurrer to said amended bill; likewise

Martin v. Jamison.

as to the assessment of damages on the dissolution of complainants' preliminary injunction; and reverses and remands the decree with directions.

[Opinion filed May 21, 1891.]

APPEAL from the Circuit Court of Henderson County; the Hon. JOHN C. BAGBY, Judge, presiding.

This suit is brought by appellants against appellees. The complainants in the suit, some forty and more in number, aver that they were residents of and taxpayers in school district No. 9, Township No. 10 N., R. 4 W. 3d P. M., in Henderson County. Within the district is maintained a graded school divided into three departments viz.: primary, intermediate and high, employing a teacher in each department or grade. The teacher in the highest department acts as teacher and principal, having charge and direction of the other departments of the school. For some time prior to 1886 one James N. Derr had been employed as a teacher in and principal of such school, at a salary of \$75 per month. In the winter or spring of 1886 a large portion of taxpayers in said district and patrons of the school became dissatisfied with Derr as such teacher and principal and desired a change. After the election in the spring of 1886 a majority of the board of directors sympathized with Derr, and disregarding the known wishes of those opposed to Derr, a majority of the board, George M. Jamison and Mary E. Porter, defendants, contracted with Derr in due form of law to continue as such teacher and principal of such school for the then ensuing month of September, 1886, at a salary then fixed at the sum of \$75 per month.

In July, 1886, charges affecting the morality and integrity of Derr were made in writing and filed with the superintendent of schools of Henderson County, and upon filing thereof a time was designated for the hearing thereon, which was July 21, 1886, of which presentation and time of hearing both the board of directors and said Derr had notice. Desirous of avoiding investigation upon the charges made, Derr, acting in bad faith and conspiring with a majority of the board of directors, viz., George M. Jamison and Mary E. Por-

ter, defendants, on the 20th day of July, 1886, caused and obtained an injunction to be issued from the Circuit Court of Henderson County, on a bill being filed in such court by Derr, against the county superintendent of schools of that county, restraining and enjoining such county superintendent from a hearing upon the charge so made, and filed against Derr, as above stated. In procuring the aforementioned injunction Derr, as complainant therein, was requested to and did execute and file an injunction bond in penalty of \$300, conditioned as by law required, and George M. Jamison, one of such school board, defendant, became his surety thereon. At the August term of the Circuit Court for Henderson County, on motion and hearing thereon, the aforementioned injunction was dissolved and the bill against such county superintendent of schools was dismissed, and damages were assessed upon suggestion on dissolution of the injunction, in the sum of \$147.91, for which George M. Jamison became liable as surety on the injunction bond for Derr, as before stated.

It is further averred in the bill, that at the time of the commencement of such injunction suit and the rendition of the decree for damages, Derr was wholly and totally insolvent, and had no property or effects out of which the money in such decree directed paid could be made, and that the costs and expenses of such suit and proceedings were borne and sustained by the supporters of Derr.

It is further averred that the first term for the school year of 1886 and 1887, for which the said Derr had been engaged as teacher and principal by such majority board of directors as before mentioned, commenced on Monday, September 6, 1886, at which time and term the said Derr, under and pursuant to his said contract, began his services as teacher and principal of such school; that after the said Derr had taught the school one day, and on the evening of September 6, 1886, at a meeting of such district school board, at which meeting the said George M. Jamison acted as president, and the said Mary E. Porter as clerk, and they being the only members of the board present, and without claim or cause, the salary of the said Derr was voted to be

Martin v. Jamison.

increased from \$75 to \$125 per month; that on the 15th day of September, 1888, the superintendent of schools in and for Henderson County, after the dissolution of the injunction, and upon hearing such charges aforementioned, revoked the certificate of the said Derr as a teacher in the schools of that county, due notice whereof was given the school board and the said Derr; that thereupon such majority of the school board issued an order on the treasurer of said township to said Derr for \$34.10, which was in excess of the amount due for the services rendered, even at the rate of \$125 per month; that against the protest of the complainants, and with the full knowledge of all the facts, one J. E. Barnes, one of the defendants, then acting as township treasurer of said township No. 10, paid such order and charged the same to school district No. 9; that at the meeting of the school board on the 13th of September before referred to, George M. Jamison and Mary E. Porter voted to and pretended to contract with one Fred Jamison, a young son of George M. Jamison, to act as teacher in and the principal of such school at the compensation of \$125 per month; that the said teacher so employed had but little education, obtained in common schools; had never taught school prior thereto; had no adaptation by age, education or experience to qualify him therefor; could only obtain a certificate of qualification as a teacher of the second grade, and his services as such teacher were of small value; all of which facts were charged to have been well known by defendants George M. Jamison and Mary E. Porter at the time of such pretended employment. It is further charged that since the pretended employment of Fred Jamison as teacher the said Derr has been attending the school, and charged on information to have been aiding and assisting in the conduct and management thereof. It is further charged that no such wages as \$125 per month has ever been paid in that county for teachers, no matter how high their qualifications or extensive their experience, which defendants well knew, and that said majority of the board of directors well knew that entirely competent teachers could at the time have been obtained

for \$70 per month, and that such majority members of the said school board in so agreeing and contracting with both Derr and Fred Jamison to pay \$125 per month were guilty of wilful misconduct, malfeasance and partiality in their office as directors, and it was known by all parties to such contracts to have been so intended and executed, and that it was so done and made with intent either to be given as a gratuity to the said Jamison and Derr, or one of them, or for the like wrongful purpose of furnishing Derr with money with which to discharge debts and obligations of his incurred in the expense and cost of the litigation in the said injunction suit, and pay the damages awarded against him on the dissolution of the injunction therein, and relieve the said George M. Jamison from his liability as surety on the said injunction bond, and for the purpose of defrauding and punishing of the taxpayers of the said district, and that the pretended employment at \$125 per month of both Derr and Fred Jamison by the majority of the said board was a sham and pretense, and fraudulent and wilful misconduct, malfeasance and partiality in office, etc. It is further charged in said bill that the said George M. Jamison and Mary E. Porter, majority of such board, intend to continue to retain and employ the said Fred Jamison as such pretended teacher and principal of such school at the rate of \$125 per month, and that it is the intent of such majority of said school board and the said Fred Jamison to continue to employ the said Derr as his substitute and assistant, and that they will so do and perform, unless restrained, and will also issue orders for the payment of such persons so pretended to be employed by them, for the benefit of the said Derr and the said George M. Jamison, as before set forth, and such orders will be paid by the treasurer of such townships, one of the defendants hereto, and a fraud will be perpetrated upon the taxpayers of such district, unless restrained by the order of the court. And it is further charged that the said Fred Jamison is a mere tool of his father, the said George M. Jamison, and Mary E. Porter, and that he is being used simply for the purpose of perpetrating upon the inhabitants, patrons and

Martin v. Jamison.

taxpayers of said school district great wrong and fraud, and that if not prevented from such acts and doings by injunction, that in addition to what has already wrongfully been paid it will result in still further and greater misappropriation of the funds and moneys of such school district, for the wilful and corrupt purposes, and to subserve and promote the ends and malice of the said George M. Jamison, Porter and Derr. The bill prays for an injunction restraining the board of directors of that school district from giving orders or paying to or further misappropriating the moneys of the said district, or paying same to Fred Jamison or Derr, and that the contract between the board of directors and the said Jamison be set aside, and the general prayer for relief.

The bill was sworn to in due form, upon which bill an injunction issued as prayed on bond given in the penal sum of \$300. At the August term, 1889, of said Circuit Court, defendants answered the bill denying each and every allegation thereof the injunction on motion of defendants being dissolved, and the bill was dismissed as to a part of the complainants, and thereupon complainants by leave of court filed a supplemental bill, in which was averred by way of supplement that after the filing of the original bill the said board of directors issued to said Fred Jamison orders on the school fund of said township for the sum of \$375, being the amount claimed due for services as such teacher and principal under such pretended and fraudulent contract, at the rate of \$125 per month, and praying that said George M. and Fred Jamison and Mary E. Porter or some one of them, the facts considered, be required to repay to the school fund the said sum of \$375 so improperly paid to them, and for general relief, etc.

To which supplemental bill a demurrer was sustained, and at the March term, 1890, a final decree was entered without hearing on the issue joined in said cause dismissing the original and supplemental bills, for the reason assigned in such decree; that the said contract of hiring and the payment of wages and rendering of the services of the said Fred Jamison, had long prior thereto been completed and performed

and the wages paid, wherefore the Circuit Court found there was nothing left in the original bill for the court to act upon, and that it would be useless for the court to grant the relief prayed for, if the complainants by the people were entitled thereto, and that the allegations of the bill would not justify the relief prayed for, and the bill ought to be and was accordingly dismissed for want of equity, and that the complainants pay the costs, etc. Upon suggestion of damages being filed on the dissolution of the injunction the Circuit Court upon hearing evidence as to such damages only, awarded defendants the sum of \$263.65, as follows, viz.:

To John C. Pepper, legal services and ex-	
penses	\$125.00
To R. J. Grier, legal services and expenses..	98.45
“ Fred Jamison, expenses to R. Island....	7.35
“ George M. Jamison, expenses to R. Island,	
wit. fees on affts., swearing thereto and	
telegraphing.....	32.85
	<u>\$263.65</u>

which was decreed to be paid as such damages for wrongfully suing out said injunction by complainants in thirty days; in default thereof defendants to have execution therefor, etc. To which aforesaid order, findings and decree the complainants excepted and prosecute an appeal to this court.

Messrs. KIRKPATRICK & ALEXANDER, for appellants.

Messrs. GRIER & STEWART and PEPPER & SCOTT, for appellees.

UPTON, J. The errors complained of in the Circuit Court are:

- 1st. In dismissing the original and supplemental bills.
- 2d. The assessment of damages in defendant's favor on dissolution of the injunction and without a hearing of the case on its merits.
- 3d. That the assessment of damages were improper and excessive.

First. We are of the opinion that the original and amended bills as filed made a case for equitable jurisdiction, at the least

Martin v. Jamison.

by way of injunction. It was averred in the original bill that a majority of the directors of school district No. 9, who were made parties defendants to the bill, intended by fraud and indirection to pay out the public money to that district belonging through one Fred Jamison, who was by them employed, to one James N. Derr, as an assistant teacher and in fact principal of that school, and who at the time of such alleged employment held no certificate as a teacher. In such case if no injunction had been sought equity will grant relief. Board of Education et al. v. Arnold, 112 Ill. 12.

Upon the same principle equity would restrain the payment of any of such public moneys for such unlawful and for any fraudulent purpose, to any one by the board of directors of such district.

In Jackson v. Norris, 72 Ill. 364, it was held that a court of equity will entertain a bill on behalf of taxpayers for relief against an act of misappropriation of public, corporate funds after it has been committed, as well as to enjoin the commission of such act, when meditated.

It was further held in that case, that courts of chancery will interfere to prevent municipal councils from abusing powers relating to property and funds intrusted to them, to be exercised in conformity with law, for the benefit of the incorporated place or its inhabitants, and will relieve against fraudulent disposition of its property and the authorities cited in support of the opinion, which would seem conclusive upon that point. Hence, the Circuit Court erred in dismissing the original and amended bills for want of equity. The court also erred in sustaining the demurrer to complainant's amended bill.

The fact that the money had been paid to Fred Jamison under the circumstances in the answer and amended bill set out, in no manner prevented the relief sought by complainants. Neither Jamison nor the school directors could defeat the injunction or complainants' right to relief by their own wrongful act in paying the money, if the allegations of the bill were sustained upon hearing the case upon its merits. Board of Education v. Arnold, *supra*, and cases cited.

It is a familiar principle that equity once having obtained jurisdiction will retain it until complete justice is done, even though adequate relief can be reached only by a personal judgment. *Hurd v. Ascherman*, 117 Ill. 501; *Pool v. Docker*, 92 Ill. 501.

Second. We think the Circuit Court also erred in dismissing the original bill, on the disposition of the motion to dissolve the injunction, and refusing to hear evidence of the complainants as offered upon the matters set up therein. The cause was at issue upon its merits, and no demurrer having been interposed to the original bill, complainants had a right to be heard upon their issues. The injunction therein prayed was not the only relief sought, or prayed for, and the suit still remained in the Circuit Court for hearing upon the issues joined, after the dissolution of the injunction, as before. It is clear that the dissolution of a preliminary injunction can not affect the ordinary progress of a suit in equity, it being collateral to the main object of the bill. It by no means follows from the dissolution of the preliminary injunction that the complainants are not entitled to other relief sought, and that can only be determined by a hearing upon the merits, which may result in granting the relief sought, with a perpetual injunction also, as frequently occurs in practice and is fully warranted and established by precedent and authority too familiar to require citation or further comment. To dismiss a bill in such case, without a hearing on the merits, is to cast the complainant in damages for wrong doing in suing out an injunction, for the doing of which he might on the hearing clearly establish his right. Complainants had an undoubted right, we think, to such hearing, for if they established the averments and charges of the bill, as we have attempted to show, they were entitled to relief, and the injunction was not improperly sued out; and if that be so, it is apparent that they should not be cast in damages therefor, upon its dissolution. In such case there could be no breach of the condition of the injunction bond. In the case at bar the injunction was dissolved upon coming in of defendants' answer denying the allegations of the bill, and the

bill thereupon was dismissed, and the claimed damages of \$263.65 assessed for the wrongful suing out of the injunction, and a hearing of evidence upon the merits was denied. This we think was error manifestly. *Woerishoffer et al. v. S. E. & W. Ry. Co.*, 25 Ill. App. 84; *Fisher v. Tribby*, 5 Ill. App. 336; *Wilson v. Weber*, 3 Ill. App. 125; *Terry et al. v. Trustees of H. P. School*, 72 Ill. 479; *Blair v. Reading*, 99 Ill. 600.

The correct rule as we think was stated by Judge Pleasants in *Gillett v. Booth*, 6 Ill. App. 429, viz.: "When an injunction is the only relief sought and it is dissolved on motion *upon the bill alone*, which operates as a demurrer for want of equity and admits all the facts alleged, the order of dissolution is a final disposition of the case and the formal dismissal of the bill may regularly follow, *but not otherwise*;" which is supported in this State by the following cases: *Titus v. Mabee*, 25 Ill. 232; *Hummert v. Schwab*, 54 Ill. 142; *Weaver v. Poyer*, 70 Ill. 567.

Third. It follows, therefore, that the assessment of damages on the dissolution of the preliminary injunction in the Circuit Court was erroneous for the reasons above set forth, and for the further reason that the evidence fails to show that the attorneys' fees allowed were the usual and customary fees, or that the attorneys had not an agreement for a less amount, or that appellees had paid or become obligated to pay therefor the amount allowed. In no case could appellees be allowed for their own time or expenses in going to the court or attendance therein. The decree of the Circuit Court must therefore be reversed and the cause remanded with directions to set aside the order sustaining the demurrer to the complainants' supplemental bill and decree, dismissing the original bill and proceed to a hearing of the cause on the original and supplemental bills on the issues joined and to be joined thereon and in conformity with the views herein above stated.

Reversed and remanded with directions.

Reversed and remanded with directions.

JOSEPH BRECHON ET AL.

V.

ETZARD DUIS.

Practice—Appeal from Chancery Decree—Absence of Certificate of Evidence.

Upon appeal from a decree in chancery, where there is no certificate of evidence in the record, and the decree does not recite the evidence nor the findings of the court below, the case must be reversed without regard to the merits,

[Opinion filed June 17, 1891.]

APPEAL from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Messrs. W. & W. D. BARGE and M. ROSENTHAL, for appellants.

Mr. A. K. TRUSDELL, for appellee.

C. B. SMITH, P. J. This was a bill in equity, brought by appellee against appellant to set aside a certain deed made by Joseph Brechon, conveying his farm to his children, Jules P., Gustavus P. and May P. Brechon for a consideration of \$8,000. One thousand was paid at the time and a note and a mortgage given for the remaining \$7,000. This deed was made June 15, 1885. Some time after this deed was made and the mortgage executed an arrangement was made between Joseph Brechon and his children that the note and mortgage for \$7,000 should be canceled, and in lieu thereof the children entered into an agreement binding themselves to pay the father and mother the annual sum of \$200 per year during their natural lives. The \$1,000 paid on the farm was borrowed of Alexander Robertson, one of the defendants, and a mortgage on the farm given him to secure this loan by the children of Joseph Brechon above named.

Brechon v. Duis.

Prior to the date of the foregoing transaction, Peter Brechon, a son of Joseph, had rented a farm from appellee, Duis, and given his note or notes for the rent to accrue in the sum of \$1,000, and Joseph Brechon had become surety for his son on this note, and it was for a failure to pay this note, or some part of it, and which it is claimed was reduced to judgment against Joseph Brechon, that this bill was filed. The bill charges that the foregoing sale of the land to the children of Joseph Brechon was fraudulent and made with intent to hinder and delay appellee in the collection of his judgment. This charge in the bill was denied by all the defendants, and strict proof of every allegation in the bill demanded. Issue was joined and the cause heard by the court and the prayer of the bill granted and the deed set aside as fraudulent. Appellants prayed an appeal and obtained sixty days in which to prepare a certificate of evidence. They never asked for a certificate of evidence, nor did the appellee take the precaution to have a certificate of the evidence, nor does the decree recite what the evidence was or the findings of the court. The evidence is not present either in the record nor in the decree. The decree will, therefore, have to be reversed because there is not sufficient evidence present in the record or decree to support the decree of the court, which must be done under our practice. There is not even evidence of a judgment. *Marvin v. Collins*, 98 Ill. 510; *Gage v. Eggleston*, 26 Ill. App. 599; *Baird v. Powers*, 131 Ill. 66.

Without any reference to the merits of the case the decree will be reversed and cause remanded.

Reversed and remanded.

THE CHICAGO SASH, DOOR AND BLIND MANUFACTURING COMPANY

V.

ELIZABETH J. SHAW.

Practice—Time for Filing Transcript—Stipulation Extending.

No stipulation between the parties can excuse the appellant from a compliance with the commands of the statute as to the time in which a transcript of the record must be filed in this court.

[Opinion filed June 18, 1891.]

APPEAL from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Messrs. R. S. FARRAND and R. D. HUZAGH, for appellant.

Mr. SHERWOOD DIXON, for appellee.

Per Curiam. The last day of the September term, 1890, of the court at which the decree in this case was rendered was the 18th day of October, 1890. More than twenty days intervened between that day and the first day of the December term, 1890, of this court. The record should have been filed at the last December term. It appears that a stipulation was signed by solicitor for appellant and solicitor for appellee on the 18th day of November, extending the time for filing appeal bond and presenting a certificate of the evidence until the 18th of December—several days after the convening of this court at the December term—and for that reason appellant now insists that the motion to dismiss this appeal should be overruled. Under the statute it was obligatory upon the appellant to file the transcript of record in this court at the December term thereof. As this was not done, the appeal must be dismissed. Any stipulation of the parties that the

C., B. & Q. R. R. Co. v. Evans.

transcript of the record could be filed at a later time than that commanded by the statute, can not be recognized as of any validity. The statute is peremptory that the appeal shall be dismissed if its conditions are not complied with in reference to filing the record. This court so held in the case of Hatch v. Wegg, 5 Ill. App. 452.

Motion sustained and appeal dismissed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
v.
JOHN H. EVANS.

39	261
69	185
39	261
109	196

Practice—Time for Filing Copy of Record—Computation of—Construction of Statute.

Under Sec. 73, Chap. 110 R. S., regulating the time within which a certified copy of the record must be filed in the Appellate Court, the proper rule is to exclude the day on which the time commences to run and include the day to which it should run.

[Opinion filed June 18, 1891.]

APPEAL from the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. SWEENEY & WALKER, for appellant.

Messrs. GRIER & STEWART, for appellee.

LACEY, P. J. The appellee moves the court to dismiss appellant's appeal in this case, and assigns for cause that a certified copy of the record of the judgment appealed from was not filed in this court in apt time required by the statute. The facts are as follows: The September term of the Circuit Court, A. D. 1890, of which the judgment in question was appealed from, adjourned November 22, 1890. The next term of the Appellate Court convened December 2, 1890.

If the day on which the Circuit Court adjourned be excluded and the first day of the Appellate Court be included, then ten days elapsed between the day of adjournment of the Circuit Court and the convening of the Appellate Court; and if such computation be admitted as correct, then by the terms of the statute the record should have been filed in this court by the tenth day of the December term, 1890, and not having been filed herein till long afterward, the appeal should be dismissed. The appellant contends that under the statute only nine days elapsed between the adjournment of court and the convening of the Appellate Court, and hence the appeal is brought here in time. Upon the construction of Sec. 73, Chap. 110, the right to file the record of said cause at this term of court depends. The section in question, after providing for the filing of an authenticated copy of the record in the Appellate or Supreme Court, provides that if twenty days shall have intervened between the date of the judgment appealed from, now so changed as to require the appeal to be taken from the day of the adjournment of court, instead of the date of the judgment, and the sitting of Appellate or Supreme Court, "but if ten days, and not twenty days, shall have intervened, as aforesaid, then the record shall be filed, as aforesaid, on or before the tenth day of said succeeding term; otherwise said appeal shall be dismissed until further time to file the same shall have been granted."

It is contended by appellant that the clause, "intervening," etc., between the adjournment of the court and the convening of the Appellate Court, should be construed so as to require that the day of the adjournment of the Circuit Court, as well as the day of the convening of the Appellate Court, should both be excluded. In such case only nine days would intervene, and the appeal brought here would be in apt time. We do not understand that such is the proper construction of the act. It has been uniformly held that where language like that in the above sections is used it is the rule to exclude the day on which the time commences to run, and include the day to which it should run. *Vairin v. Edmonson*, 5 Gilm. 270; *Roan v. Rohrer*, 72 Ill. 582; *Higgins v. Halligan*, 46 Ill. 173.

Westgate v. Aschenbrenner.

Therefore we must hold that the authenticated copy of the record was not filed in this court in the time required by the statute, and in accordance with its peremptory provisions the appeal should be dismissed. But the appellant contends that appellee has waived his right to dismiss the appeal by assigning cross-errors and filing his briefs, and therefore his motion should not be sustained. Such has not been the ruling of this and other Appellate Courts of this State. It has always been held that the parties could not by such acts waive the right to move for dismissal, and indeed the court might dismiss the appeal on its own motion. The motion will have to be sustained and the appeal dismissed.

Motion to dismiss appeal herein granted.

GEORGE WESTGATE
V.
REINHART ASCHENBRENNER.

Replevin — Alleged Sale — Evidence — Instructions—Stenographer's Notes.

1. In an action of replevin, this court holds, the jury having been correctly instructed, and the evidence supporting the verdict, that the judgment for the plaintiff must be affirmed.

2. Upon petition for rehearing, where the petitioner complained that a point of law had been overlooked by the court, *held*, that as the point in question had not been presented by the instructions asked in the court below, it was not to be considered here.

3. Although an instruction may be erroneous considered as an abstract statement of law, yet where the court can see that the jury were not misled, the judgment will not, on account of such error, be reversed.

[Opinion filed December 22, 1890.]

APPEAL from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Messrs. DIXON & BETHEA, for appellant.

Messrs. R. S. FARRAND and J. E. LEWIS, for appellee.

Per Curiam. This case was a suit in replevin to recover the possession of a road-cart, which, as appellee claimed, he had sold and delivered to appellant for \$30, which was to be paid for on delivery or the next morning, and the purchase price not being paid as agreed, the appellee brought the suit. It is the counterpart of the same transaction litigated in appellant against appellee and reported in this volume, page 266. The same complaint is made that the evidence fails to support the verdict. We think it sufficiently supports it, and there was no error committed by the jury. It was correct for the court to refuse to allow the stenographer's notes to be read to the jury as a part of the evidence to refresh the jury's mind as to what the evidence was.

It was not error under the circumstances in this case to limit the number of appellant's impeaching witnesses.

Seeing no error the judgment is affirmed.

Judgment affirmed.

Upon Rehearing.

[Opinion filed June 23, 1891.]

Per Curiam. We have examined the appellant's petition for rehearing and the points made. It is complained that the court has not noticed all the points made in appellant's brief. This may be, but we had fully considered them and find nothing after re-examination in the petition to change our minds as to the rightfulness of the judgment of affirmance. It is claimed in the petition for rehearing that there was a law point in the case that this court failed to notice, to wit: That the law is that where property is sold and delivered on credit, that the vendor parts with the title, so that replevin will not lie. This may be admitted to be the law as a general rule, but this point of law was not raised, or attempted to be

Westgate v. Aschenbrenner.

raised, by instructions offered by appellant and refused or given to the jury. The questions of the supposed sale and the delivery of possession, whether conditional or otherwise, was one of fact for the jury to pass upon, uninfluenced by instructions. For anything this court can know, the jury found from the evidence that the delivery of the cart was only conditional on the part of appellee, without intention of parting with the title without payment. If it so found, the contention of appellant falls to the ground. It is complained by appellant that appellee's fourth instruction is erroneous, in telling the jury that "in case defendant refused to perform his part of the contract concerning the sale of the property in question with intent to abandon it, etc., that the plaintiff had a right to treat said contract as rescinded," etc.

This instruction as a mere proposition of law might not be entirely accurate, but when applied to the undisputed facts concerning the appellant's insistence of what the contract was, and his entire repudiation as to the claim of original sale made by appellee, we can not think the jury could be misled, and would undoubtedly refer the instruction as pointing to the claim of appellant, as the claim of sale to him of the cart by appellee, and his refusal to carry out or agree to any such supposed sales, and this will be clearer when read in connection with the modification to appellant's offered instruction, which reads: "This would be so unless the jury believes from the evidence that a time was fixed by the parties for the payment of the purchase price, and at the time so fixed the defendant repudiated the contract and denied having purchased the cart, in which event the plaintiff would have a right to rescind and could then maintain replevin for the cart."

It will be remembered that on the trial appellant entirely denied that there was any sale of the cart, and insisted that he traded a top buggy for the cart and two cows, and he therefore repudiated any claims of sale. Undoubtedly there was a misunderstanding of the parties as to the sale of the cart, and a denial on appellant's part that there was a sale. The instructions and modifications could only refer to this fact,

and in such case it was not error to instruct the jury that appellee might acquiesce in appellant's claim and recover the cart. In addition to this we think the evidence clearly supports the verdict, and that justice has been done. We can not see how any other verdict could have been returned properly in the case.

Petition for rehearing denied.

GEORGE WESTGATE

V.

REINHART ASCHENBRENNER.

Replevin—Alleged Sale—Evidence.

No error of law appearing, and the evidence supporting the verdict, the judgment for the defendant must be affirmed.

[Opinion filed December 22, 1890.]

APPEAL from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Messrs. DIXON & BETHEA, for appellant.

Messrs. R. S. FARRAND and J. E. LEWIS, for appellee.

Per Curiam. This was an action of replevin commenced by appellant against appellee to recover the possession of two cows, resulting in a verdict in favor of appellee.

The errors assigned and argued are that the verdict was against the weight of the evidence, and that the court gave an improper instruction for appellee. We will first consider the complaint that the verdict is manifestly against the weight of the evidence. It is true that appellant testified that he purchased the cows, and he was supported by one witness who testified to alleged admissions of appellee, but this evidence was met by as positive evidence on the other side that there

Mississippi Valley Manf'rs Mut. Ins. Co. v. Bermond.

was no sale. Under the evidence the jury were fully justified in their verdict. The instruction complained of was appellee's third, which told the jury in substance that in order to constitute a valid sale and purchase of the cows, the minds of the parties must meet. This instruction was correct in principle and applicable to the evidence in the case, and it was therefore not error to give it.

The judgment of the court below will therefore be affirmed.

Judgment affirmed.

Upon Rehearing.

[Opinion filed June 23, 1891.]

This case grew out of the controversy between the parties, involved in the preceding case, in which a rehearing has at this term been denied, and for the reasons given in the opinion therein a rehearing in this case is denied.

Petition for rehearing denied.

MISSISSIPPI VALLEY MANUFACTURERS' MUTUAL
INSURANCE COMPANY

v.

M. BERMOND.

Practice—Failure to Name Court to Which Appeal is Taken.

Where neither the prayer for an appeal nor the order of the Circuit Court granting the same, names the court to which the appeal is to be taken, but the transcript is filed in this court, the case must be stricken from the docket.

[Opinion filed June 23, 1891.]

APPEAL from the Circuit of Rock Island County; the
Hon. ARTHUR A. SMITH, Judge, presiding.

39	267
61	207

VOL. 39.] Mississippi Valley Manf'rs Mut. Ins. Co. v. Bermond.

Messrs. JACKSON & HURST, for appellant.

Messrs. J. T. KENWORTHY and McENIRY & McENIRY, for appellee.

Per Curiam. Judgment was rendered in favor of appellee and against appellant by the Circuit Court of Rock Island County; and upon the rendition of such judgment appellant prayed an appeal which was allowed upon the filing of bond and bill of exceptions within the time limited in the order. No court was named in the prayer for appeal nor in the order of the court allowing the same. The statute provides that appeals from Circuit Courts may be taken to the Appellate Courts, provided such appeals shall be prayed for and allowed at the term at which the judgment was rendered. In order to give this court jurisdiction of an appeal, such appeal must be prayed for by the party desiring to appeal, and must be allowed by the court from which the appeal is taken. It is the duty of the court to act upon the prayer for appeal, and allow or disallow the same. If the case is one of which this court would have jurisdiction on appeal, a prayer for appeal to this court should be allowed; but if a franchise or other matter of which this court has no jurisdiction is involved it should not be allowed. The allowance of an appeal is the act of the court. In this case the Circuit Court never granted appellant an appeal to this court. The filing of the transcript of the record in this court is the act of appellant, and the right to bring the case to this court by appeal can not be acquired by its act alone. There is no appeal here for this court to act upon, and the case will be stricken from the docket. *Gage v. Arndt*, 114 Ill. 318.

Stricken from docket.

Woodburn v. Baum.

CHARLES H. WOODBURN ET AL.

V.

EDGAR G. BAUM.

Practice.

Judgment reversed under rule 27, no brief having been filed by appellee.

[Opinion filed June 25, 1891.]

APPEAL from the Circuit Court of Whiteside County; the Hon. JAMES H. CARTWRIGHT, Judge, presiding.

Messrs. JOHN G. MANAHAN, for appellants.

Messrs. O. F. WOODRUFF and J. D. ANDREWS, for appellee.

Per Curiam. The appellees have failed to file any brief in this case as required by rule 26 of this court, and in accordance with rule 27, the judgment of the court below may be reversed and the cause remanded in our discretion. We are requested by attorney for appellant to reverse the judgment and remand the cause, in pursuance of such rule 27. It is therefore ordered that the judgment in the above entitled cause rendered by the Circuit Court be reversed and the cause remanded.

Reversed and remanded.

Judge CARTWRIGHT, having tried the case below, took no part in the decision here.

THE PLANO MANUFACTURING COMPANY

V.

A. M. PARMENTER.

Practice—Weight of Evidence—Instructions—Delivery to Common Carrier as Evidence to Show Delivery to Consignee—When Consignee is Agent of Consignor Instead of Purchaser.

1. Where a plaintiff states such a case in an instruction as requires a verdict in his favor, and requests the court to instruct the jury, that if they find the facts to be as stated, then they *must* return a verdict for the plaintiff, it is error for the court to substitute the word *may* for *must*.

2. Proof of delivery of goods to and their shipment by a common carrier to a consignee, suitably and properly billed and directed, is just as strong and effectual *prima facie* evidence of their receipt by the consignee, even if such consignee is the agent of the consignor, as it would be if the consignee were the purchaser of such goods.

[Opinion filed June 26, 1891.]

APPEAL from the Circuit Court of Peoria County; the Hon. LAWRENCE W. JAMES, Judge, presiding.

MR. ARTHUR KEITHLEY, for appellant.

MR. JOHN M. TENNERY, for appellee.

UPTON, J. This case was before this court at a former term, and will be found reported in 32 Ill. App. 633, to which we refer for a full statement of the facts. It was reversed in this court on the former appeal because of an erroneous instruction as to the burden of proof to establish mistake or fraud in a settlement claimed to have been made between the parties October 24, 1885. Upon the remand to the trial court the case was reinstated and again heard with a jury, which resulted in a verdict for the appellee. A motion for a new trial was interposed, which, being overruled, the case was again appealed to this court. In brief as to its facts the case is simple; appellant's right of recovery depends upon the fact of whether or

39	270
58	259

39	270
79	236

not appellee, who was the agent of appellant in making sales of its machinery, at Knoxville, Ill., received of it in the summer of 1885, three or four mowing machines, and whether appellee has paid for all the machines he received of appellant that season. We have given to this record a careful perusal and attentive study, particularly induced thereto by the various trials had of the case, and we are compelled to say that the verdict in this case is manifestly against the weight of the evidence and can not be supported thereby. There had been a settlement between the parties according to a settlement sheet, which charged appellee with three mowers, one of which was stated to have been shipped from Peoria and the other two from Plano. Appellant claimed a recovery for a fourth mower claimed to have been shipped from one Stumpf, of Avon, and not charged on the settlement sheet. It was conceded by appellee upon the hearing and trial in the Circuit Court that he had received from appellant three mowing machines, being two of those named in the settlement sheet, and the one claimed to have been shipped appellee by Stumpf, of Avon (for appellant), but denied receiving one of the three mentioned in that sheet, and disputed the correctness of the sheet in that respect. Appellant asked the court to instruct the jury that if they believed from the evidence that the appellee received the three mowers as mentioned in the settlement sheet, in evidence, and if they believed in addition thereto appellee received one other machine from Stumpf, of Avon, then the appellant *must* recover in this case the value of one machine as fixed by the contract, less his commission also fixed by that contract. The trial court refused to give this instruction as asked, but of its own motion modified the same by striking out the word "*must*" and inserting instead thereof the word "*may*," thus in effect telling the jury that although the evidence might be sufficiently strong to establish the fact in their minds that appellee had in fact received from appellant *four* mowing machines, under a contract to pay or account for all he should receive, and that appellee had accounted for three only, still, under such circumstances, if

established by the evidence, they are not compelled to find a verdict according to the facts, as established by the evidence, but "*may*" do so if they see fit. This was manifestly erroneous and should not have been so modified. The giving of this instruction under the evidence in this record may in great part account for the verdict returned by the jury.

We also think the trial court erred in giving appellee's first and second instructions as to the burden of proof; these two instructions are certainly in direct conflict with the views of this court upon that question as stated in our former opinion.

We are also clearly of the opinion that the trial court erred in giving to the jury two instructions, which are not numbered in the series, in which the jury are instructed that the law applicable to the case of delivering to a common carrier of goods by a *vendor*, has no application to the case at bar.

We think the law is, that the proof of delivery to, and the shipment of goods by a common carrier to a consignee, suitably and properly billed and directed, is just as strong and effectual *prima facie* evidence of their receipt by the consignee, even if such consignee is agent of the consignor, as it would be if such consignee were the purchaser of such goods. The rule is properly the same in both cases, and the trial court should not have instructed the jury differently.

This evidence was not introduced to show that appellee was the purchaser of the machines, but simply to show *prima facie* that he received the machines so shipped. For the reasons indicated the judgment of the Circuit Court is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed in this and the former opinion of this court.

Reversed and cause remanded.

Henning v. Eldridge.

GILBERT D. HENNING
V.
GILBERT ELDRIDGE.

Practice—Res Adjudicata—Points Passed upon on Former Appeal.

Where a decree of the Circuit Court was upon a former appeal reversed for a single error and remanded, and upon a retrial the court below corrected that error and entered a decree accordingly, upon a second appeal, this court will not hold that the court below should have passed upon claims that had been adjudicated by this court upon the former appeal.

[Opinion filed July 2, 1891.]

APPEAL from the City Court of Aurora, Illinois; the Hon. RUSSELL P. GOODWIN, Judge, presiding.

Mr. A. C. LITTLE, for appellant.

Messrs. A. J. HOPKINS, N. J. ALDRICH and F. H. THATCHER, for appellee.

Per Curiam. This case was here at the December term, 1890, and had been here in July, 1883, and reported in 14 Ill. App. 191. On the last appeal in which an opinion of this court was filed December 8, 1890, see 38 Ill. App. 551, various errors were assigned and only one found in the report of the master, to wit, an item of \$311.50 and the interest thereon charged in the master's report against the appellant, and judgment was reversed and the cause remanded alone for that error, with instructions to the court below to strike out that item of the account and accrued interest thereon charged thereon by the master. This court there said, "We see no other error in the record."

The case was certified back to the court below, and that court in pursuance to the direction of this court struck out the above named item and the interest thereon and reduced the general finding of the master to the sum of \$1,719.59, and

ordered appellant to pay it over to appellee within sixty days. From this order and judgment this present appeal is taken and appellant assigns for error this action of the court below. We are now asked to hold that the court below should have passed on and adjudicated claims which this court upon the former appeals had passed on and adjudicated. This we can not do. We have no authority even if we had the disposition to do so. *Hough v. Harvey*, 84 Ill. 308; *Wadhams v. Gay*, 83 Ill. 250.

This is the third time we have examined the facts of this case, and are fully convinced that the final judgment in the case it as near right and just as it is possible for this court to make it. The judgment of the court below is therefore affirmed.

Judgment affirmed.

S. P. McDOLÉ

V.

A. G. McDOLÉ.

Real Property—Bill in Chancery—Tenant Per Autre Vie—Waste—Method of Estimating.

1. Upon the case presented it is *held*: That the appellant was a tenant in possession *per autre vie*, and that he was liable to the owner of the inheritance for waste permitted.

2. Upon the question of the value of wood cut and sold from the premises, testimony of witnesses stating the amount of wood actually cut and sold outweighs that of witnesses estimating the value of the wood per acre.

[Opinion filed August 3, 1891.]

APPEAL from the Circuit Court of Kane County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. BOTSFORD & WAYNE, for appellant.

Mr. CHARLES WHEATON, for appellee.

McDole v. McDole.

LACEY, P. J. This was a bill in chancery in the Circuit Court by appellee against appellant, commenced on the 23d day of May, 1881, for an accounting and the removal of an incumbrance on certain real estate described in the bill of complaints. It is alleged in the bill of complaints that on the 23d day of April, A. D. 1875, Rodney McDole, the father of the complainant and respondent, conveyed in fee simple to said parties 414 acres of land, situate in the county of Kane, partly as gift and partly as consideration of payments by each to their father of the sum of \$4,000, which payments were evidenced by two certain promissory notes executed by each of them, payable to the order of said Rodney McDole two years after his death, with interest at six per cent, to commence one year after date of said Rodney McDole's death, and to secure the payments of said notes, the makers thereof executed a mortgage to the payee on the premises so conveyed to complainants and respondents; that afterward the complainants becoming indebted to the defendants on two promissory notes, one of \$500 and the other of \$350, gave to the defendant a quit-claim deed of his interest in said premises, but that said deed was not intended to be absolute, but only as a security for said indebtedness; that defendant at the same time gave to the complainant a written defeasance reciting the said indebtedness, and agreeing to reconvey the said premises on the payment of said sums represented in said notes with interest thereon at ten per cent; that at the time of the making of the deed of the farm from Rodney McDole to the complainant and defendant, April 23, 1875, it was by lease or obligation in writing, agreed that the defendant, S. P. McDole, should occupy and have the exclusive possession of the said farm during the lifetime of Rodney and one year after, if the wife of Rodney survived him, at an annual rental of \$600, to be paid on or before April 22d of each year during this term, and then upon the death of Rodney as aforesaid, the said complainant should come into joint possession of the said premises, subject, however, to the payment of the said \$4,000 note made by him. The bill further claims that at the date of the deed from Rodney to the complainant and defendant,

there was a considerable quantity of standing timber on the said premises, some of which the defendant has since cut off and sold and appropriated to his own use, and the bill asks for an accounting from the defendant and the application of the proceeds from the wood sold on the indebtedness of the complainant.

The facts so far recited are not seriously questioned, but in so far as the bill states that the notes of \$500 and \$350 made to the defendant and the quit-claim deed do not bear the date of the transactions as actually had, and that as a part of the terms of the said lease the defendant was to make all the repairs and improvements on the farm at his own expense, and that there were large and valuable tracts of timber cut off of the farm by the defendant and sold, of more than sufficient value to pay said notes, these allegations are denied. The answer also sets up, among other things, that the defendant expended large sums of money in improvements and repairs on said premises, and that he should have the value of same allowed to him in the accounting. The answer denied the jurisdiction of the court in the premises, and set up the statute of frauds as to all the oral agreements in the bill. It also appears that on August 1, 1891, the defendant commenced an action on the common law side of the said court against the complainant to recover an alleged indebtedness from complainant to defendant, aside from that represented in the two notes, and in his bill of particulars makes the aggregate sum of such indebtedness \$458.64. To this action the defendant appeared and pleaded the general issue, set-off, and statute of limitations. At the October term, 1881, by stipulation of the parties, this and the common law suit were consolidated, and at the February term, 1884, of the said court the cause was referred to the master to take proof, and on the 27th day of June the master's report was filed, stating the value of the wood cut and sold from the farm by defendant at \$1,350, and the indebtedness of the complainant on the two notes and other accounts allowed by him at the sum of \$1,253.45, making a balance to complainant from defendant of the sum of \$96.55. The court, overruling all exceptions, found and

decreed the said two notes of \$500 and \$350 fully paid and a balance due from defendant of \$96.55, and ordered defendant to deed to complainant the interest so conveyed by him to the defendant by deed of January 1, 1876, and pay the said \$96.55 and costs of suit. The court, by its decree as to all questions covering improvements on the said lands, reserved the same as undetermined. On the first point made by the appellant, S. P. McDole, that he was not liable to account for the waste permitted by him on the premises in question, we hold against him. We hold that S. P. McDole was a tenant in possession during the life of Rodney McDole, and was a tenant *per autre vie*. Such a tenant in possession can commit waste as against the remainderman or owner of the inheritance. 1 Washb. on Real Prop., page 110, Marg. We will now consider the question in regard to the amount of the finding of the court below as to the waste committed, and as to this we think the court was in error. The evidence shows that the estimate of the witnesses as to the number of cords of wood per acre is too great, and the evidence by estimate is not of that reliable character as that of witnesses showing the actual amount cut and hauled away. The best evidence as to the amount of wood gotten from the place is that given by witnesses who personally knew what was actually taken, rather than the estimate of others as to what the land would yield, and such evidence should be taken in preference to mere guess-work of witnesses, however reliable as to impartiality. We think as to the value of the wood in the tree, as shown by the evidence, it would not be to exceed \$2 to \$2.25 per cord. If the hauling to the market was worth \$2 per cord, and cutting without board eighty cents per cord, and the wood sold at \$5 per cord, the value of the wood in the tree would not exceed \$2.20. The estimate of the witnesses as to the amount of wood taken necessarily includes the posts that were cut, which, as a tenant in possession, appellant had a right to use for repairs. It also includes wood for firewood, which he had a right to use. This, we think, was not taken into account in the court's estimate, and shows its erroneousness. Taylor's Landlord and Tenant, Sec. 351,

and cases cited. The amount paid by appellant as a guarantor of lease for A. G. McDole's office rent of \$105, the master should take into account, and on both sides all claims to the time of hearing. The bill of particulars can be amended as a basis of calculation. As to the proper mode of calculating what a tenant in possession has received see *Moshier v. Norton*, 100 Ill. 63, and 83 Ill. 524. The decree of the court below is reversed and the cause remanded, with directions to refer the cause to the master in chancery to take further proof if desired by either party, and to make the calculations on the evidence according to the views here announced upon the whole evidence as it may hereafter appear.

Reversed and remanded with directions.

RICHARD GOLDSBROUGH

v.

JOHN M. GABLE.

Practice—Time for Taking Appeal to Supreme Court—Not Extended by Pendency of Petition for Rehearing.

The time within which an appeal from a judgment of this court to the Supreme Court may be prayed is limited to twenty days, and that time is not extended by the pendency of a petition for rehearing, but a party must elect which of these remedies he will pursue. He can not have both unless his petition for rehearing is disposed of within the twenty days.

[Opinion filed June 24, 1891.]

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Messrs. SHEEN & LOVETT, for appellant.

Messrs. ISAAC C. EDWARDS and GEORGE B. FOSTER, for appellee.

Per Curiam. Having examined the petition for rehearing in this case and considered the same, a rehearing is denied.

Gould v. Warne.

The petition for rehearing being denied, the appellant prays for an appeal to the Supreme Court. The final judgment of this court in the case was rendered May 28, 1890 (36 Ill. App. 363), and more than twenty days have elapsed since that time. The time within which such appeal may be prayed is limited by statute to said period of twenty days. In the case of Sholty et al. v. McIntyre (opinion filed January 10, 1891), N. E. Rep., Vol. 26, p. 655, the Supreme Court decided that an appeal must be prayed within twenty days from the rendition of the judgment notwithstanding a petition for rehearing may be pending. It is there said that a party is in effect put to this election, to either apply for a rehearing or to appeal, but he clearly can not have both remedies, unless he can have his petition for rehearing presented and decided before the time for taking an appeal has elapsed. The prayer for an appeal in this case was that if the opinion filed should be held to be the law of the case and the rehearing be denied, then in that case an appeal was prayed. The appellant could not pursue both remedies by asking the judgment of this court upon the alleged errors complained of in his petition and saving his right to pray for an appeal after the expiration of the time allowed by law. The prayer for appeal will be denied.

Appeal denied.

C. W. GOULD ET AL.

V.

JOHN WARNE ET AL.

39	279
143	19
39	279
54	274

Former Adjudication—Omission of Interest from Judgment—Possible Error, when Immaterial.

1. Decision in same case on former appeal, 27 Ill. App. 651, followed.
2. Where plaintiff was entitled under the statute, to interest on his claim, but such interest was not included in the judgment, an objection

raised by the defendant, appellant, to the amount of the judgment, the part objected to being less than the interest due but not included in the judgment, may be ignored by this court.

[Opinion filed August 3, 1891.]

APPEAL from the Circuit Court of DeKalb County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. SHERWOOD & JONES and BOTSFORD & WAYNE, for appellants.

It is a universal rule of construction that a surety can not be bound beyond the express and literal conditions of his undertaking. He has a right to stand upon the very terms of his contract. *Miller v. Stewart*, 9 Wheat. 680; *Field v. Rawlings*, 1 Gill. 581.

Any agreement between the principal and his creditors by which the terms of a bond are changed without the assent of the sureties, releases the sureties from liability. *Cunningham v. Wrenn*, 23 Ill. 64; *Burt v. McFadden*, 58 Ill. 479; *Dodgson v. Henderson*, 113 Ill. 360.

The measure of the liability of sureties is fixed by the terms of the instrument they sign, and such undertaking can not be enlarged or varied by judicial construction. Their undertaking will be construed as the words used are ordinarily understood. *Mix v. Singleton*, 86 Ill. 194; *Phillips v. Singer Mfg. Co.*, 88 Ill. 305; *People v. Tompkins*, 74 Ill. 482; *Burgett v. Paxton*, 15 Ill. App. 380.

A surety is not held beyond the precise words of his undertaking, and in case of doubt as to his liability, the doubt is generally, if not necessarily, solved in his favor. *Stull v. Hance*, 62 Ill. 52; *Adams v. People*, 12 Ill. App. 380.

Messrs. CHARLES WHEATON and W. R. S. HUNTER, for appellees.

Whatever estops the principal in a case like this, estops the surety.

In *McCabe v. Raney*, 32 Ind. 399, it was held, that any act of the principal which estops him from setting up a

Gould v. Warne.

defense, personal to himself, operates equally against his sureties. To the same effect is *Stovall v. Banks*, 10 Wall. 383; *Baker v. Preston*, 1 Gilmer (Va.), 235. In the last case it was decided that the books were conclusive evidence against the treasurer and his sureties.

In *U. S. v. Girault et al.*, 11 How. 27, it was held that the principle and surety were equally estopped from setting up a defense.

In the case of *Cawley et al. v. The People*, 95 Ill. 249, the same principle was laid down as was laid down in the case of *Chicago v. Gage*.

In that case the court says: "While the liabilities of sureties are to be strictly construed, it is not the duty of courts to aid them to escape liability by a technical and hypercritical construction."

In that case the court holds that the books were proper evidence of the state of the accounts against the principal and against the sureties. The court says: "We are unable to imagine what would be better evidence against him and his sureties. The entries in the books were made by him, or by his bookkeeper, under his direction or supervision. No one can believe that he would permit improper charges to stand against him uncorrected on his books, nor that he did not examine them to see they were correct. And we are aware of no other means by which he could be as fairly charged as by his own books, if honestly kept, and he surely would not claim they were unfairly kept against himself."

The same principle is decided in *Roper v. Sangamon Lodge*, 91 Ill. 518, where the sureties were held equally with the principal to be estopped from denying the statements of the principal as to the condition of his accounts with the lodge.

LACEY, P. J. This is an action of debt commenced in the Kane Circuit Court by John Warne, William Beith and Moses Gates, who sue for the use of William Taylor, Ed. Taylor, Winfield G. Smith, Stuart Wilkinson, John W. Hunt, Michael Tierney, Philip T. Bartholomew, Elisha Warne, Moses C. Gates, O. E. Root, Aaron Whitney, Charles Moulding,

Thomas McNair, L. E. Bartlett, Robert Alexander, N. Rasmussen, Clark Anderson, J. Eliason, J. Crosby, Thomas Jones, Frank Gaunt, Patrick Scully, D. McDonald, Bradford Richmond, George D. Smith, G. W. Warne, J. E. Bartlett William Reeves, George Reeves, J. C. Johnson, John Warne, L. R. Reed, L. Richmond and A. D. Richmond, against C. W. Gould, Ed. Hugg, D. F. Barclay and D. H. Butler.

This action is predicated on a bond executed by the said Gould and Hugg as principals, and by said Barclay and Butler as sureties, dated April 24, 1882, in the penal sum of \$3,000, conditioned as follows:

"The conditions of this obligation are such that if the above bounden Gould & Hugg, their heirs and administrators, or either of them, shall well and truly pay or cause to be paid unto the said patrons of the Blackberry Cheese Factory, or their heirs or assigns or administrators, the just and full sum of the monthly dividends declared by the said Gould & Hugg to their Blackberry patrons for the milk delivered thereat, and shown by their books to be paid patrons due, then this obligation to be void and of no effect."

At the date of this bond the defendants Gould & Hugg were the owners of and conducting a cheese factory at Blackberry, in said Kane county, on what is known as the "dividend plan." The usees, with others, were, or subsequently became patrons of the factory.

The proprietors of the factory received the milk of these patrons at their factory, manufactured it into butter and cheese, and were paid for manufacturing and selling, four cents per pound for butter and two cents per pound for cheese. After the product was disposed of and the money received therefor, the proprietors deducted the costs of manufacturing, etc., and divided the net proceeds of the product among these patrons in proportion to the milk furnished by each. Gould & Hugg, in order to insure a prompt and faithful accounting for this property put into their hands, executed the bond in question, with the condition as above set forth.

On the trial in the court below, the appellees claimed that

the usees herein, who were the patrons of the milk factory, had by agreement with the proprietors, Gould & Hugg, changed the agreement with them to furnish the milk on the dividend plan and agreed to receive for their milk an amount equal to the declared dividends at another factory, called the LaFox, and hence this amounted to a sale. On the other hand it was claimed by appellees, usees, that no change had been made by any agreement with them.

The case was tried by the court without a jury, who accepted the theory of counsel for appellees as to the liability of the appellants for milk furnished, and gave judgment against the appellants for the penalty of the bond and damages in the sum of \$1,807.25. The case is now appealed to this court, assigning as errors such finding by the court and the rendition of the judgment. This is the same case that was here once before, wherein the same causes for error were assigned that are now assigned and one in addition. The judgment was at that time reversed and the cause remanded because there was a recovery in favor of certain usees not named in the declaration; but the claim of the present claimants (usees) herein was sustained by this court. The case will be found reported in 27 Ill. App. 651.

In our former opinion we passed on all the objections then and now made adversely to the claim of the appellants. One of the main grounds relied upon here for reversal, to wit, that appellees were allowed more than the dividends agreed on, was decided adversely to appellants when the case was here on former appeal; but in addition to that and as another ground for holding against appellants on that point we have to say that if the judgment is in excess of the dividends according to the dividend plan and was made upon the books of Gould & Hugg on the basis of the LaFox dividends, yet the claim of appellees had been due at the time of the rendition of the judgment on a written contract for over five years, upon which, under the provisions of our statute, they were entitled to interest at the rate of six per cent per annum, which in that time would amount to over thirty per cent in the aggregate, and the judgment, even if based on the

LaFox plan by Gould & Hugg in their estimates, would not be as much by a considerable amount as appellees were entitled to receive if interest had been allowed on the amount due strictly according to the dividend plan. The judgment can not, therefore, be excessive.

For the reasons here given and those given in our former opinion, the judgment of the court below is affirmed.

Judgment affirmed.

L. GILLETT AND S. L. GILLETT

V.

THE INSURANCE COMPANY OF NORTH AMERICA FOR
USE, ETC.

*Fire Insurance—Payment of Premium by Agents—Action by Company
Against Insured for use of Agents—Subrogation—Interest of Nominal
Plaintiffs—Consent of to Suit—Practice.*

1. Where the agents of an insurance company issued a policy of insurance, which was accepted by the insured, but on which the insured failed to pay the premium when due, and the agents, under their contract with the company, paid the premium, in an action brought in the name of the company for the use of the agents against the insured to recover the amount of the premium, it is *held*: That the agents were subrogated to the rights of the company as to the claim under the policy and that no assignment was necessary to enable them to recover the premium advanced by them.

2. A party defendant can not defend a suit by showing a want of interest in the nominal plaintiff.

[Opinion filed August 3, 1891.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Messrs. WILLIAM GEORGE and SAMUEL ALSCHULER, for appellants.

Messrs. HOPKINS, ALDRICH & THATCHER, for appellee.

LACEY, P. J. This suit was brought by the appellee for the usees, named Henry L. and James McWethey, against the appellants to recover the premium of \$75 on an insurance policy of \$5,000, dated January 9, 1890, issued by appellee to appellants, covering a risk on their farm and property at one and one-half per cent premium for five years from that date. There is no question raised here as there was in the court below as to the acceptance of the policy of the insurance issued and sent to appellants by the appellee's agent, that point now being conceded. The appellants retained the policy in their possession for about three months after it was issued and sent to them, and after it went into effect, before attempting any cancellation of it. The premium was due on the first day of February following its date, but appellants failed to pay it. The usees of appellee in this case, the McWethey brothers, were the local agents of the appellee, and as such, and in the name of it, issued the policy in question, which provides that the insured shall pay the premium of \$75 due thereon, to the company; that McWethey brothers, under their agreement with the company, make monthly settlements with it for the insurance premiums written by them, and that if the policy is not properly canceled they are held responsible for such premiums, and in case the company does not collect the premium the said usees are obliged to settle the premium with the company; that prior to the commencement of this suit, in pursuance of such agreement with the appellee, the appellants having failed to pay the premium, the said usees paid it to appellee themselves, and this suit is now brought in the name of appellee for their use, to collect the said premium so advanced from the appellants. The appellants never gave the McWethey brothers any authority to pay this premium on their accounts.

The appellants insist that the evidence does not warrant a recovery by the appellee, and that even if it is entitled to a judgment it should not exceed \$15. Appellants' counsel insist that the contract is between the appellants and appellee, and in case of the failure of the former to pay, the right of action is in the latter; that the cause of action is not

negotiable and that the claim is not assigned to the usees of appellee; that it is essential to recovery that the claim should be assigned in order to vest in the assignees the equitable title to the claim and that there is no assignment in the case; that there is no proof that the appellee ever vested the usees with the power to use its name in a suit and that appellants can not be made the appellee's usees' debtors without their consent; that the appellee has been paid and its right of action is gone. The answer to all these suggestions is that as to appellants, they have never paid the appellee anything, and no one has paid anything to it for them or at their request, and hence they have never in any way paid the debt or extinguished it as against them; and the McWethey brothers certainly never intended to extinguish it and make a present of it to appellants; they simply paid or advanced the amount to the appellee as their agents under their agreement with it as a kind of guarantors of the prompt payment of all premiums and therefore ought, in equity, to be subrogated to the rights of the appellee in the claim under the policy. Equity would require that the latter should hold the policy for the usees' protection and the law will presume that it did. The payment of the premium under the agreement by the agents of appellee, would be the only assignment the law would require to give the agents the right to sue on the policy in the name of appellee for their own use. And this is a matter in which the appellants have no concern. They owe the premium on the policy and it matters not to them that the money when collected goes to the usees instead of the appellee. If appellee does not complain of the manner of bringing the suit, it seems to us that appellants should not be heard to interpose objections. It is and should be a rule of law that a party defendant can not defend a suit by showing a want of interest in the nominal plaintiff. *Alsook v. Cain*, 10 Johnson, 400. The appellants make the other point that the recovery should only have been for \$15, the amount at short rates which had accrued on the insurance up to the time they claim to have canceled the policy according to its terms. The trouble with this defense is that appellants did

P. & P. Union Ry. Co. v. Herman.

not take the requisite steps to procure a legal cancellation of the policy under its terms. The policy contains this provision: "Assured may also cancel this policy and surrender the same after the premium or premium note has been paid and the company shall retain short notes and all the expenses incurred in taking the risk." It will be seen that the premium has never been paid. In fact, this suit is brought to recover it. Under these circumstances no cancellation has ever taken place. There being no other errors assigned and failing to discover any in the points made, the judgment is affirmed.

Judgment affirmed.

PEORIA & PEKIN UNION RAILWAY COMPANY

V.

EMMA HERMAN, ADM'X.

Railroads—Negligence of—Personal Injuries—Crossings—Duty of Railway Company to Provide Flagman—Absence of, not Negligence per se—Instructions.

1. In an action brought against a railway company to recover damages caused by the killing of plaintiff's intestate at a crossing of a highway and defendant's track, where the chief ground of complaint was the failure of defendant to have a flagman stationed at the crossing at the time of the accident, it is *held*: That it was error for the court to instruct the jury that if it was a *reasonable* precaution to be exercised by the persons in charge of defendant's engine to keep a flagman at the crossing, then a failure to do so would be negligence. Unless such precaution was *necessary* it could not be said to be negligence to have omitted it.

2. The failure of a railway company to keep a flagman at a crossing is not negligence *per se* and an action can not be directly predicated on such failure and consequent injury, but it may be based upon the failure of the company to approach the crossing with due care and caution; and the failure to keep a flagman at the crossing, or any other omission, may be shown by way of specifications of the cause of such failure. And if from all circumstances it appears that the doing of a particular thing is necessary to the safety of persons crossing the tracks, then the company is required to do that thing.

3. An instruction to the effect that deceased was required to exercise reasonable care for his own safety at the *time* of receiving the injury was improper.

[Opinion filed August 3, 1891.]

APPEAL from the Circuit Court of Peoria County; the Hon. LAWRENCE W. JAMES, Judge, presiding.

Messrs. STEVENS & HORTON, for appellant.

The defendant was not guilty of negligence.

The plaintiff was bound to prove that Ephraim Herman exercised due care for his own safety. C., B. & Q. R. R. Co. v. Damerell, 81 Ill. 450; C., B. & Q. R. R. Co. v. Hazzard, 26 Ill. 373; C. & A. R. R. Co. v. Gretzner, 46 Ill. 74; C., B. & Q. R. R. Co. v. Dewey, 26 Ill. 255; C., B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510; Abend v. T. H. & I. R. R. Co., 111 Ill. 202.

She failed to prove that he exercised the degree of care that was always required by the Supreme Court when it considered questions of fact. C. & A. R. R. Co. v. Gretzner, 46 Ill. 74; C., R. I. & P. R. R. Co. v. Still, 19 Ill. 499; I. C. R. R. Co. v. Buckner, 28 Ill. 299; T., P. & W. Ry. Co. v. Riley, 47 Ill. 514; St. L., A. & T. H. R. R. Co. v. Manley, 58 Ill. 300; C. & A. R. R. Co. v. Jacobs, 63 Ill. 178; T., W. & W. Ry. Co. v. Miller, 76 Ill. 278; Austin v. C., R. I. & P. R. R. Co., 91 Ill. 35; C. & N. W. R. R. Co. v. Dimmick, 96 Ill. 42; C., R. I. & P. R. R. Co. v. Bell, 70 Ill. 102; Chicago & N. W. R. R. Co. v. Hatch, 79 Ill. 137.

It is error to refuse to set aside a verdict that is against the clear preponderance of the evidence. Moyer v. Swygert, 125 Ill. 268; Peaslee v. Glass, 61 Ill. 94; Chicago v. Lavelle, 83 Ill. 482; Reynolds v. Lambert, 69 Ill. 495; C., B. & Q. R. R. Co. v. Gregory, 58 Ill. 277; Crouse v. Whitelake, 15 Ill. App. 384; Lincoln v. Stowell, 62 Ill. 84; Mooney v. People, 111 Ill. 388; C., R. I. & P. R. R. Co. v. Herring, 57 Ill. 59; I. C. R. R. v. Chambers, 71 Ill. 519; Ricks v. Stubblefield, 12 Ill. App. 309; C. & A. R. R. Co. v. Barber, 15 Ill. App. 630; Booth v. Hynes, 54 Ill. 363; Southwell v. Hoag, 42 Ill. 446;

Lockwood v. Onion, 56 Ill. 506; Chadwick v. McKee, 18 Ill. App. 646; Keaggy v. Hite, 12 Ill. 99; Koester v. Esslenger, 44 Ill. 476; Hoobler v. Hoobler, 128 Ill. 645; A., T. & S. F. R. R. Co. v. Snider, 127 Ill. 144; Steffy v. People, 130 Ill. 98.

Plaintiff's first instruction is erroneous because—

1. It instructs that a failure to do certain things is negligence, without proof that the failure contributed to the injury. T., W. & W. Ry. Co. v. Jones, 76 Ill. 311; I. & St. L. Co. v. Blackman, 63 Ill. 117; G. & C. U. R. R. Co. v. Dill, 22 Ill. 264; C., B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510.

2. Because it invades the province of the jury. Meyers v. I. & St. L. R. R. Co., 113 Ill. 386; C., G. & H. Co. v. O'Brien, 19 Ill. App. 231; C. & E. I. R. R. Co. v. O'Connor, 119 Ill. 586; Pa. Co. v. Frana, 112 Ill. 398; T. H. & I. R. R. Co. v. Volker, 129 Ill. 540; C., M. & St. P. R. R. Co. v. Wilson, 42 A. & E. R. R. Cases, 153 (Ill. case), 24 N. E. Rep. 555.

3. It defines certain things to be negligence without reference to other precautions taken. G. & C. U. R. R. Co. v. Dill, 22 Ill. 271.

Plaintiff's third instruction was erroneous because it only required the jury to find that Herman exercised due care *at the time he received the injury*. C., M. & St. P. R. R. Co. v. Halsey (Ill.), 23 N. E. Rep. 1028; C., B. & Q. R. R. Co. v. Colwell, 3 Ill. App. 545; C., B. & Q. R. R. Co. v. Sykes, 1 Ill. App. 520; C. & N. W. R. R. Co. v. Clark, 2 Ill. App. 116; I. C. R. R. Co. v. Welden, 52 Ill. 290.

And it is no answer to the objection to this or the first instruction that defendant's instructions were accurate. C., B. & Q. R. R. Co. v. Flint, 22 Ill. App. 502; Star & Crescent Milling Co. v. Thomas, 27 Ill. App. 137; C. & W. I. R. R. Co. v. White, 26 Ill. App. 586; P. & P. U. R. R. Co. v. O'Brien, 18 Ill. App. 28; C. & N. W. R. R. Co. v. Dimmick, 96 Ill. 42; I. & St. L. R. R. Co. v. Blackman, 63 Ill. 117; C., B. & Q. R. R. Co. v. Harwood, 80 Ill. 88.

Plaintiff's fourth instruction is erroneous in that it submits to the jury the question whether a flagman ought to have been stationed at this crossing at the time of day the accident

happened, and does not limit the inquiry to the care and caution with which the particular engine was operated. *Heddles v. C. & N. W. Ry. Co.*, 74 Wis. 239, S. C. 42 N. W. Rep. 237; *Haas v. G. R. & I. Co.*, 47 Mich. 401; *Houghkirk v. President, etc., D. & H. C. Co.*, 92 N. Y. 219; *McGrath v. N. Y., C. & H. R.*, 63 N. Y. 522; *Beiseigel v. N. Y. C. R.*, 40 N. Y. 9; *Welsch v. H. & St. J. R. R.*, 72 Mo. 451; *Lesan v. M. C. R. R.*, 77 Me. 85; *Griffin v. N. Y. C.*, 40 N. Y. 34; *C. & I. R. R. Co. v. Lane*, 130 Ill. 116.

Messrs. SHEEN & LOVETT and McCULLOCH & McCULLOCH, for appellee.

No argument or citation of authorities will, we think, be necessary to show that the statute designs to make it the duty of every railway company to make their crossings over public highways reasonably safe, and to prohibit them from constructing man-traps; nor is anything more than an inspection of the undisputed evidence necessary to show that this crossing, coupled with the combination of circumstances surrounding deceased at the time of the injury, was nothing less. This makes the company chargeable with notice of the dangerous circumstances that it constructed. *R. R. I. & St. L. R. Co. v. Hillmer*, 72 Ill. 235. As said in the case last cited, "a railroad company should not permit obstructions upon its right of way near a crossing which will prevent the public from observing the approach of trains upon the track."

Under the common law, railway companies were required to furnish suitable crossings. *People ex rel. v. C. & A. R. R. Co.*, 67 Ill. 118. And this duty was enlarged by Sec. 71, Chap. 68 of the R. S., so as to require the companies to make and maintain their crossings and the approaches thereto, in such manner as to have them "at all times safe as to persons and property." The company constructed these buildings and they precluded a view of the approaching trains.

Again, in the case of *C., B. & Q. R. R. Co. v. Lee*, Adm'x, 87 Ill. 460, the court says: "Here were obstructions preventing to some extent, at least, a view of the approaching train; it was out of time, running at a fearful rate of speed; no whistle sounded

or bell rung; no effort to check its rate, and no watchman stationed at the crossing to warn persons of approaching danger. All of which are held by the opinion quoted above to be negligence on the part of the company."

Quoting approvingly from a decision of the United States Supreme Court, in that case it is said :

"It is the duty of a wagon to wait for the train. The train has precedence of right of way, but it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every caution if the wagon is inevitably in the way. Such warning must be reasonable and timely."

"If an unslackened speed is desirable, watchmen should be stationed at the crossing. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with and conditioned upon the duty of the train to give due and timely warning of approach."

At this crossing, in a populous city, the engineer quits his post, has the fireman back his engine, pushing the tender at a high rate of speed toward a crossing, from which to the south and west the engine and tender were invisible. No watch is put upon the forward end of the tender, the watchman on the crossing is relieved from duty, and the bell, if rung, is not so rung as to be audible to any one but the railroad employes, and not all of them within hearing distance heard it.

LACEY, P. J. This was an action in case by the appellee against appellant to recover damages accruing to her from the killing of her husband, Ephraim Herman, deceased, by running over him with a car, called a tender, attached to a locomotive engine and being backed over a public crossing in the city of Peoria, where at the same time deceased was crossing in front of the tender. This crossing was at a place being the extension of Junction street. This street is fifty feet wide where it ends and the crossing appears to be a continuance of it with planks eighteen feet long in the center between the rails. The south end of the junction building is on a line with the north

side of Junction street, leaving a space of over twenty feet between the building and the traveled track marked by the planks laid for the crossing. It will not be necessary to give a detailed description of the place and the surroundings of the crossing further than to say that it was necessary on the part of a person approaching the crossing, especially in the absence of a flagman, to use great care and caution to prevent injury when crossing with a wagon and team attached, as the deceased was doing in this instance. It also required a corresponding care on the part of the railroad to so run its trains at that point as to prevent injury. Notwithstanding these requirements the deceased, while crossing the railroad track at this place, on April 7, 1888, was run over and so wounded and injured that he soon thereafter died. As far as will be necessary to notice the points in controversy, the acts of negligence as charged in the declaration were as follows, to wit: That Herman was injured through the appellant's negligence in running an engine and tender at a rapid rate of speed, without ringing any bell or sounding any whistle or giving any other audible signal of its approach; and without keeping any proper lookout and without having any flagman at said crossing to warn persons of danger. It is claimed by appellant that none of these charges were properly proven. Especially is it insisted that it was not proven that no bell was rung or whistle sounded at this crossing, but to the contrary the bell was rung and the whistle sounded at the approach of the crossing. It is also insisted that the evidence overwhelmingly shows that the engine was not being run at a rapid or dangerous rate of speed while approaching the crossing. It is further insisted by appellant that they had the proper lookout; that the engineer was standing on the front end of the engine (the rear end as it was backed toward the crossing) looking back over the crossing between the building and the engine and had as good a view as he would have had if he had been in the cab; that the fireman was in the cab on the side next to the building, keeping a careful lookout over the crossing at the time of the approach. Appellant claims the only point on which there was much contention before

the jury, was that a flagman should have been stationed at the crossing at the time, and that the accident taking place after six o'clock p. m., and there being very little travel over the tracks, a flagman was not needed. The record shows further, that the city of Peoria in its grant of privilege had reserved and stipulated that such companies should consent to the appointment of as many policemen as the city council of the city of Peoria might deem necessary for the protection of the public, the compensation therefor to be paid by the railroad companies. The mayor was empowered to make the appointment and in this manner the city assumed control of the appointment of all flagmen and determined when and where they were needed and what compensation they should receive. One John Flood was appointed by the mayor for this station and was acting as flagman at the time, and the hours designated for duty at this station by the mayor were from seven in the morning until six in the evening, and that he was under the control of the mayor and not of the appellant. Flood was on duty the day of the accident until six in the evening, when he left, as was his custom, and at the time of the accident there was no flagman, and appellant insists that none was necessary, there being but little travel at the time. It was also a contested question whether the deceased exercised due care for his own safety while approaching the crossing, appellant insisting that appellee failed to prove he did so, but on the contrary failed to keep a lookout for a passing engine as he should have done while approaching the crossing. We will not undertake, in this case, to pass upon the question of the weight of evidence or to decide whether it was sufficient to support the verdict of the jury; suffice it to say that it was sufficiently close and contradictory to require of the court below to give proper and accurate instructions to the jury. This, it is insisted by appellant, was not done, and he points out as error the giving by the court of appellee's first, third and fourth given instructions. The necessary parts of the instructions complained of to raise the questions sought to be decided, are as follows:

The first instruction: "If the jury believe from the evi-

dence that the ringing of a bell or the sounding of a whistle or the keeping of a lookout for persons about to cross said tracks or the keeping of a flagman at said crossing, were reasonable precautions to be exercised by the persons in charge of such engines with reference to the safety of such persons, then a failure to use such reasonable precautions would be negligence on the part of the persons so operating such engines."

The third instruction: "If the jury further believe from the evidence that at the time of receiving such injury the said Herman was in the exercise of reasonable and ordinary care in respect to his own safety and that the persons in charge of and operating the said engine were guilty of negligence in manner and form as charged in the declaration and defined in these instructions, and that by reason of such negligence the said Ephraim Herman was struck and killed, then the plaintiff should recover," etc.

The fourth instruction: "And if the jury believe from the evidence that such flagman was reasonably necessary for said purpose (the reasonable safety of those traveling over the crossing) at the time, to make such crossing reasonably safe, then, under the law, the presence of a flagman employed by the city up until just before the injury occurred, would not release the defendant from its duty to provide such flagman upon that crossing at the time of the injury, provided the appellant had notice that their city flagman usually quit his station before the time of day when the injury occurred."

We think the first and third instructions were erroneous. The first instruction holds that if it was a reasonable precaution to be exercised by the persons in charge of the engine to keep a flagman at the crossing, then a failure to do so would be negligence. It will be observed that this instruction does not base the keeping of flagmen at the station as a necessary reasonable precaution to prevent injury to those crossing, which, we think, to make the instruction good, it should have done. It might be a reasonable precaution and one very proper and appropriate to take and yet not be necessary. Very many things might be done reasonably to prevent injury and yet not be necessary.

And if not necessary it would certainly not be negligence to omit them. If other measures could have been taken equally effective to protect persons crossing from injury from any approaching train, then the keeping of flagmen would be unnecessary although it might be very reasonable to keep one. It would not be proper to hold that the failure to keep a flagman was negligence unless, under all the evidence and circumstances in the case, the injury would result without it; then it would be necessary, and not to do so would be negligence, and in case injury was the result of such failure then a recovery might follow. When we read the first instruction, which we have noticed above, in connection with the third, which tells the jury that if the person in charge of and operating said engine in the manner as charged in the declaration and defined in the instructions, the recovery would follow, we at once see how vicious and injurious the improper definition of what is negligence, as defined in the first instruction in regard to keeping the flagman, would be. The two instructions taken together in such form, we think, would be misleading. It could not properly be said, as supposed in the third instruction, that by reason of the negligence in not keeping a flagman when it was not necessary to protect the deceased, that the injury would or could result from such omissions.

In such case the injury might have resulted from some other cause, either from deceased's own negligence or that of the appellant in not carefully approaching the crossing. The failure to keep a flagman at a crossing by a railroad company is not negligence *per se*, but if at all, only in connection and on account of other conditions which may be shown to exist. It is not a statutory duty and not made by law a negligent act like many statutory requirements. In this connection we will consider the objection made to the fourth instruction. It is objected to this instruction that it left the jury to determine whether the reasonable safety of the traveling public required the defendant to keep a flagman at the crossing at the time of day the accident happened; and if it did the jury were told in substance the defendant would be liable for a failure to have a flagman there. We suppose counsel mean if injury resulted

in consequence of such failure. Nothing is said about recovery in the instruction, however, but that may be predicated on other instructions in connection with this one. It is argued that appellee might show the absence of the flagman as part of the surroundings—as one of the incidents by which the care required in managing the train might be determined, but not in general as a legislative necessity. Appellant quotes a number of authorities from other States and one from our own in support of the doctrine.

In the case of *Heddles v. C. & N. W. Ry.*, 74 Wis. 239, the court say: "So that the question is never whether there should have been a flagman or ought to have been one stationed at the crossing, but whether, in view of his presence or absence the train was moved with prudence or negligence?" In *Haas v. ———*, 47 Mich. 401, the court says: "It would, no doubt, have tended to the security of travelers at this point, but there is no statute requiring it and the judiciary can not establish police rules on their own judgment where the Legislature has apparently considered none essential." In the case of *Houghkirk v. President, etc., D. & H. C. Co.*, 92 N. Y. 219, the court held that "A railroad company is not bound, and owes no duty so to station flagmen, and negligence can not be predicated of an omission." The Supreme Court of our own State in the case of *C. & I. R. R. v. Lane*, 130 Ill. 116, in commenting on this subject, says: "Although there was no ordinance requiring a flagman to be placed at the crossings, yet we think the fact that none was there was properly allowed to be shown to the jury as one of the existing circumstances attending upon the alleged injury. The absence of a flagman was not negligence, yet such absence, in connection with proof of the condition of things with respect to population, travel and otherwise in that particular locality, would shed light upon the question of the care and caution on the part of appellant in running its trains as the safety of the public would reasonably require." In *C., B. & Q. R. R. Co. v. Perkins*, 125 Ill. 127, the court, in speaking of the question of the rights of allowing a plaintiff to prove that no flagman had been stationed at the crossing, says: "If a railroad com-

pany in the running of its trains, accept what the Legislature might prescribe, the position of counsel might be well taken, but such is not the case. A railroad company in the running of its trains is required to use ordinary care and prudence to guard against injury to the person or property of those who may be traveling upon the public highways and are required to cross its tracks, whether required by the statute or not. The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety and common prudence may dictate. *Shober v. St. P., M. & Minn. R. R. Co.*, 28 Minn. 107.

From the last case cited it would appear that while an action can not be predicated directly on the failure to keep a flagman at a crossing, and consequent injury, it may be based upon the failure of the railroad company to approach the crossing with due care and caution, and the failure of the company to keep a flagman at the crossing; or any other omission may be shown by way of specifications of the cause of such failure. And if from all the surrounding circumstances it appears that the doing of any particular thing is necessary to secure the safety of the people crossing the tracks, then the railroad company would be required to do that thing. It is true the railroad company might adopt measures to secure the safety of the public equally effective with the stationing of a flagman at a crossing, and if it did so and made the flagman unnecessary, then it would not be required to have a flagman, and no injury in such case could result for the want of a flagman. In view of the decision, while the fourth instruction may not be logically correct, we can see no such error in it as would be likely to mislead a jury, and we can see no cause for reversal in the giving of that instruction. In addition the declaration specifies as a cause of action, the failure to keep a flagman at the crossing. Another point is made on the third instruction and that is, that the deceased was only required to use reasonable and ordinary care in respect to his own safety at the *time* of receiving the injury. This part of the instruction is claimed to be misleading in not requiring the deceased to use such care while he was approaching the

crossing, as well as at the very moment of receiving the injury. This point is not a new one in this State. It has often been held by the Appellate Court as well as the Supreme Court, that such an instruction is erroneous, as the jury might understand that the deceased was not required to exercise any care for his own safety except at the moment of receiving the injury.

We cite the following cases which clearly support the claim: C., M. & St. P. R. R. Co. v. Halsey, 133 Ill. App. 248; C., B. & Q. v. Caldwell, 3 Ill. App. 545; Same v. Sykes, 1 Ill. App. 120; C. & N. W. v. Clark, 2 Ill. App. 116; I. C. R. R. v. Weldon, 52 Ill. 290. If the writer hereof were deciding the case for the first time he would not feel disposed to construe the word "time" as it appears in the instruction in so limited a sense as to mean the word "inoment," but would rather be disposed to hold that it meant the entire occasion of the accident—as well the approach to the crossing as the very moment of the accident; but we feel the question is too well settled by the decisions to allow of a change. We see no error in the giving of appellee's second instruction. For the errors above indicated the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

THE COUNTY OF DU PAGE

V.

HENRY H. MARTIN ET AL., COMMISSIONERS.

Mandamus—Statutory Right of Town to Reimburse from County for Expenses Incurred in Bridge Building—Emergency—Amendment of Record of Town Clerk.

1. The commissioners of highways have the right to control the amendment of a record according to the fact, and to order the clerk to make the amendment accordingly; and when the record is once amended in a proper and legal manner, it has the same force and effect as though originally made

39	298
142	607
39	298
49	421
39	298
52	621
39	298
74	412

County of Du Page v. Martin.

as amended, and can no more be contradicted by parol than any other lawful record.

2. Upon an application by a town board of road commissioners to the board of county supervisors for the payment by the county, under Sec. 19, Roads and Highways and Bridges Act, of one-half the expense of the construction of a bridge, the supervisors must not refuse the application because there is no formal proof of the facts alleged in the petition; but the petition, if it state the jurisdictional facts, with the affidavits and estimates, constitutes a *prima facie* case. If the supervisors have doubts as to the alleged facts, it is their duty to investigate.

3. In a mandamus proceeding by the commissioners against the county, the court may receive evidence that was not before the supervisors.

[Opinion filed August 3, 1891.]

APPEAL from the Circuit Court of Du Page County; the Hon. C. W. UPTON, Judge, presiding.

This was a petition for a writ of mandamus filed in the Circuit Court, February 21, 1888, by appellees against appellant, seeking to compel the board of supervisors of Du Page County to appropriate to the appellees, as the commissioners of highways of the town of Winfield, the sum of \$1,081.60, one-half the expense of constructing a bridge and its approaches across the Du Page at Gary's Mills in said township. By stipulation the cause was submitted to the court for hearing in vacation, in Chicago, at chambers. By the agreement the jury was waived and the issues submitted to the court. The demurrer was overruled, the answer filed, and the court heard the evidence and decided the cause in vacation, May 15, 1890, as of the September term, 1889. In vacation after the March term, 1890, the court decided the cause and filed judgment in the court, granting the prayer of the petition and ordering that a peremptory writ of mandamus issue against the board of Du Page County, ordering them to appropriate from the county treasury a sum sufficient to meet one-half of the expense of the bridge work mentioned in the petition, amounting to the sum of \$1,081.60, for the use and benefit of the said town of Winfield, for the purposes and in the manner provided by law.

The petition, which was fully supported by the proof, showed that there was a public highway running from the

village of Turner to the village of Warrenville across the Du Page river at a place known as Gary's Mills; that the road was a public road and subject to the commissioners of highways; that on or about the eighth day of February, 1887, the bridge on the public highway across said river at Gary's Mills was, in consequence of high water, washed away and the river on said road at said point was thereby made impassable; that in consequence of the destruction of said bridge at said point it became necessary to construct a new bridge at said place, together with the approaches thereto, and that the town of Winfield was responsible for the same; that the cost of the necessary bridge and the approaches would be and is more than twenty cents on the \$100 of the latest assessment roll of said town, and that the levy of the road and bridge tax for said current year in the said town is for the full sum of sixty cents and more on each \$100 allowed by law for the commissioners of said town to raise, the major part of which was needed for the ordinary repairs of roads and bridges in said town, and that all the other facts necessary in order to entitle the commissioners in said town to aid from the county, as provided in Chap. 121 of the Revised Statutes of Illinois, existed at the time said bridge was destroyed and still exists. The petition then shows that on the eighth day of March, 1887, the petitioners as such commissioners made a very careful estimate of the probable cost of building a new bridge and the approaches thereto at such a place, and attached thereto their affidavits that the same was necessary, and would not be made more expensive than was needed for the purpose desired, and thereupon filed the same with the county clerk of said Du Page County, and presented it to the board of supervisors of said county regularly in session. Their petition to the board, estimates and affidavits in substance were as follows: The petition represented that a bridge needs to be built over the Du Page river at the place mentioned in the above petition, and that the town of Winfield was wholly responsible; that the total cost of building the bridge would be about \$2,300, which sum will be more than twenty cents on the \$100 of the latest assessment roll of

said town, and that the levy of the road and bridge tax for the present year in said town was for the full amount of sixty cents on each \$100 allowed by law for the commissioners, the major part of which is needed for the ordinary repairs of roads and bridges, wherefore the commissioners of highways thereby petition to make an appropriation from the county treasury for a sum of money sufficient to meet one-half the expenses of the said bridge. To said petition to the supervisors was attached an estimate of the commissioners of the probable cost of the bridge, sworn to by them. The petition shows that the board of supervisors rejected the petition for various reasons set up by them, such as the reasonable cost of the bridge would not exceed the required twenty cents on the \$100, last year's valuation of said town; that the commissioners did not levy the required sixty cents on the \$100 as required by statute referred to, and that a sixty-cent levy would not be needed for the ordinary repairs of the roads in said town, nor a major part of it. The petition for mandamus shows that an emergency existed for the immediate building of the bridge on account of the destruction of the old one, and that the supervisors would not be in session for several months, and the commissioners proceeded to construct the same and completed it March 1, 1887, at a cost of \$2,163.21, which was immediately thereafter paid by the commissioners. Therefore a supplemental petition was filed with the county clerk July 24, 1887, and the same presented to the board of supervisors then in session. This petition was supplemental to the former one, setting up the facts as to the emergency in detail, and the manner of letting the contract for the construction of the bridge, and the costs of the same in detail, which was duly verified by the commissioners. This petition to the board of supervisors, as the petition for mandamus shows, was referred to a committee of three of the board of supervisors, who reported September 13, 1887, that it should be rejected for the following reasons:

1. That no emergency existed justifying said commissioners in constructing said bridge before the board had been appealed to for aid.

2. That the amount alleged to be the contract price and the amount alleged to have been paid out and expended was more than was necessary for the purpose.

3. That the major part of the taxes levied, referred to in the petition, was not needed for the ordinary repairs on the roads and bridges as alleged.

4. For other reasons not enumerated and other failures to comply with the law, we recommend the petition be not granted.

This report was approved by the board and the prayer of the petition and the supplemental petition denied. The petition then reiterates the jurisdictional facts entitling the appellees to the relief sought and prays for the writ of mandamus. The bill of exceptions shows that the various facts were true as alleged in the petition. Clinton J. Nettnorton, clerk of Winfield township since April, 1889, and who succeeded Charles P. Stark, who was dead, identified the records kept by the town clerk of the town.

It was shown by the records of the town clerk, that at the annual town meeting of the town of Winfield in April, 1886, the road and labor system was adopted in said town, and that the road and labor tax of 1886-7 was levied at forty cents on the one hundred dollars real estate and personal property liable to taxation, and it was shown by the records of the board of supervisors that it had levied twenty cents on the one hundred dollars valuation. The records of the commissioners of highways on page 396 were read in evidence, which showed that at a meeting of the commissioners, February 19, 1887, it was decided "to build an iron bridge in place of the one swept away" at Gary's Mills, and the legal notices inviting bids for the construction of the bridge were proposed and afterward posted and recorded. Then the record of a meeting of the commissioners of highways held at the bridge site at Gary's Mills for the purpose of letting the contract of building the bridge held March 1, 1887, was introduced, and in connection therewith an amended record was read and inserted on the same page before the record of the bridge contract, which shows that the board at the same meeting found

that the immediate building of the bridge in question was necessary, and a delay in so doing detrimental to the public interest, and the cost of such new bridge was more than twenty cents on the one hundred dollars on the latest assessments of said town, and the levy of the road and bridge tax for that year was for the full amount of sixty cents on the one hundred dollars, allowed by law for the commissioners to raise, and the major part of which was needed for the ordinary repairs of roads and bridges, and it was unanimously voted that the bridge be immediately built as provided by law, and that aid be asked of the county board as provided by statute. It was conceded by petitioners that the above part of the record last recited was inserted on the 16th day of September, 1889, pursuant to a vote of the commissioners to correct said record, which record of the order to correct was read, and shows that at a meeting of the commissioners of highways of the town of Winfield, duly called and held on the 16th day of September, 1889, C. D. Clark was appointed clerk *pro tem.*, the clerk being absent from the county, and thereupon a motion was duly and unanimously voted that the minutes and record of the previous meeting of the board be amended and corrected to correspond with the fact by inserting the following on page 398 before the record of the bridge contract. The bridge contract was conceded. Their record showed the cost to be \$2,163.21, and an order directing the clerk to employ counsel to make application to the board of supervisors for one half the costs of building the bridge.

Messrs. JOHN H. BATTEN and L. C. COOPER, for appellant.

Mr. ELBERT H. GARY, for appellees.

LACEY, P. J. The right to maintain this action by appellees is claimed to exist and arise under Sec. 19 of "Roads, Highways and Bridges Act," in force July 1, 1883, approved June 23, 1883, Session Laws 1883, page 142.

The section is as follows, to-wit:

"When it is necessary to construct or repair any bridge

over a stream, or any approach or approaches thereto, by means of an embankment or trestle work on a public road in any town, on or near to, or across the town line, in which work the town is wholly or in part responsible, and the cost of which will be more than twenty cents on the one hundred dollars on the latest assessment roll, and the levy of the road and bridge tax for that year in said town was for the full amount of sixty cents on each one hundred dollars (\$100) allowed by the commissioners to raise, the major part of which is needed for the ordinary repairs of roads and bridges, the commissioner may petition the county board for aid, and if the foregoing facts shall appear, the county board shall appropriate from the county treasury a sum sufficient to meet one-half of the expenses of the said bridge or other work on condition that the town asking aid shall furnish the other half of the required amount. * * * *Provided*, however, that before any bridge or approaches contemplated as above shall be constructed or repaired under the provisions of this section, the commissioners shall make a careful estimate of the probable cost of the same and attach thereto their affidavits that the same is necessary and will not be made more expensive than is needed for the purpose desired; and such affidavit and estimate shall be filed with the petition. *Provided*, that in case of some emergency arising from the sudden destruction or serious damage to a bridge or its approaches, when delay in repairing or rebuilding would be detrimental to the public interest, such petition to the county board may be presented during the progress of the work or after its completion, and if the facts appear as contemplated by this section, then the county board shall appropriate one-half of such cost, with like conditions that the town pay the other half."

It appears from the record in this case, the appellees, as commissioners of highways, soon after the 8th day of March, 1887, petitioned the board of supervisors for the required one-half aid for building the bridge over the Du Page river at Gary's Mills, in which they showed the necessity of the bridge at that point, and that the town of Winfield was wholly responsible for building it; that the point over the said stream

where the contemplated bridge was to be built was a part of one of the public highways of said town. They also showed that the total cost of the said bridge would be about the sum of twenty-three hundred dollars (\$2,300), according to certificate of the estimate of the cost of the said bridge, signed by the commissioners and verified according to the statute by the said commissioners, showing that the said cost was necessary and that the same would not be made more expensive than was needed, which estimate and affidavit was filed with the petition. The petition also showed that the sum necessary to build the bridge would be more than twenty cents on the \$100 valuation of the latest assessment roll of the said town, and that the levy of the road and bridge tax for that present year was for the full amount of sixty cents.

In a supplemental petition to the appellant the appellees set up and showed by the necessary averments that an emergency arose on account of the destruction of the old bridge for the building of the new bridge across the river at the point named, and that on the 8th day of March, 1887, they contracted in the proper way for building a new bridge, and that it had been completed at a cost of \$2,163.21. But the appellant's board of supervisors rejected the petition and the supplemental petition for the reasons shown in the statement of the case. As will be seen by the same statement, the appellees, the commissioners, made all the jurisdictional findings as an organized board and in the manner provided for in the statute to entitle them to the aid from appellant claimed by them, including the proviso respecting the emergency, to authorize the building of a bridge prior to the granting the aid by the board of supervisors, and these findings were introduced in evidence at the hearing of the mandamus in the court below, as duly entered in the records of the town kept by the clerk thereof. The appellant, as we gather, makes no objection to the record of the town clerk as it appeared at the trial, except that it was improper for the commissioners to order the amendment of the town clerk's record, and for it to be made showing the existence of the emergency to build the

bridge prior to the granting the relief asked for of the appellant. It is insisted by counsel for appellant that it is necessary for the highway commissioners as an organized body to take official action on every material matter entitling them to relief, and that such official action can only be shown by the record which the law requires them to keep of their proceedings, citing the case of *The People v. Madison County*, 125 Ill. 334. The above case holds, concerning the conditions upon which relief may be granted from a county to a town, that "the acts are by law made jurisdictional and without their concurrence, the county board is without power to appropriate money for the purposes stated." And the Supreme Court further deciding in the said case makes use of this language:

"The determination of these jurisdictional facts is left to the commissioners of highways. Acting as alone they have the power to act, together and as a board, at a meeting of the board, they are to determine," etc., of which determination, the court adds, they are required by the act to make and keep a record. And it appears the court held in that case that one of these facts to be thus founded and recorded in cases where an emergency requires the building of a bridge before the asking of aid was the existence of the emergency. It will be seen that these objections have no force in this case unless the amendment of the record was improperly made; for, admitting that the amendment was proper, every fact existed requiring the supervisors to vote the appropriation sought. The fact that the amendment was not of record at the time that appellees' petition was rejected would not be good grounds for the refusal of the petition. The supervisors or the report of the committee do not base the rejection of the petition upon the facts, or even as a ground of objection, that the finding of the existence of an emergency by the appellees was not of record. If such objection had been made it would no doubt have been obviated at once by the amendment of the record. The petition presented to the board of supervisors by the appellees showed plainly that the building of the bridge prior to presenting the petition

was justified by the emergency caused by the destruction of the bridge by high water. Of these facts the board of supervisors must have been fully informed, as it was a matter of public notoriety, and it does not appear that they even called for the record of the finding of this emergency by the commissioners; it is not necessary, as we understand the law that the board of supervisors may properly refuse to make the appropriation because there is no formal proof of the facts alleged in the petition. Such matters thus presented by the towns through their commissioners acting as public officers make out a *prima facie* case. If the supervisors have any doubts as to the truth of any of the allegations in the petition they should investigate the matter. If they had done so in this case they would no doubt have discovered the true condition of affairs, and the record would have been complete and to their satisfaction. It follows from this that in a mandamus proceeding the court may receive evidence which was not offered before the board of supervisors. Such a defense as this is unsubstantial and has little to commend it to favor, as was fully held in Board of Supervisors v. Town of Condit, 120 Ill. 307. The next point then we will notice is, was the amendment of the town record allowable at the time and in the manner made? We think that it was properly done. "The power of the town clerk to amend a record in accordance with the facts is derived solely from his official character, and it does not depend upon the permission of the court in which it is offered as an instrument of evidence, nor inquiry into the truth of it as originally made or amended." The town clerk may amend according to the facts. The Boston T. Co. v. The Town of Pomfret, 20 Conn. 589; Chamberlain v. Dower, 13 Me. 472; Willis v. Batteville, 11 Mass. 480. If a town clerk be temporarily absent the entries of a clerk *pro tem.* made by direction of the corporate authorities are competent evidence and properly made. Hutchinson v. Pratt, 11 Vermont, 402. In the case of Willis v. Batteville, *supra*, the Supreme Court of Massachusetts said: "We have had frequent occasion to perceive the great irregularity which prevails in our towns

and other municipal corporations, and the courts have always been desirous to uphold the proceedings where no frauds or wilful error was discoverable. It can not be expected that in all corporations persons will every year be elected who are capable of performing their duty with the exactness which would be useful and convenient. We are of the opinion that the clerk had the power to amend the record."

This doctrine was adhered to in *Hartwell v. Town of Littleton*, 13 Pick. 229. We will take occasion here to say that these words are very apt, and the rules there laid down are peculiarly applicable to town officers and other like officers in this State, and in our judgment will be found quite necessary in following out the strict rules of the law pertaining to town clerks and highway commissioners, laid down in *The People v. Madison Co.*, *supra*. If every official act of the highway commissioners must be recorded at length and in methodical form, frequent amendments will no doubt be required to uphold the rights of the town and the people. We are of the opinion also that the commissioners of highways have the right to control the amendment of a record according to the facts, and to order the clerk to make the amendment accordingly. And when records are once amended in a proper and legal manner, they should have the same force and effect as though originally made and amended, nor can they be contradicted any more by parol than other lawful records. Appellees' attorneys have furnished us authorities more or less applicable to the questions of the rights of amendments herein discussed, and their force and effect, which we cite as follows: *Thatcher v. Maack*, 7 Ill. App. 635; *Jefries v. Rudolff*, 73 Ia. 60; *Johnson v. Donnell*, 15 Ill. 97; *Morris v. Trustees*, 15 Ill. 269; *Madison Co. v. Rutz*, 63 Ill. 65; *Bliss v. Harris*, 70 Ill. 343; *Brennan v. Shinkle*, 89 Ill. 604; *Ames v. Snyder*, 69 Ill. 376; *Mott v. Reynolds*, 27 Vt. 206.

The record when amended operates *nunc pro tunc* and shows that the action of the commissioners took place at the proper time and manner as shown by the amended record, and this can not be contradicted by parol evidence. Therefore

Schriner v. Peters.

the court properly ruled in rejecting all evidence in regard to matters required to be of record and which were of record. We having now decided that the amendment of the record was proper as made, all the objections of counsel for appellant to the judgment in this case fall to the ground. We now find that the appellees were clearly entitled, according to the statute and the decisions of our Supreme Court, to one-half of the cost of building the bridge in question, from the appellant, and that the appropriation asked for ought to have been made long ago. Seeing no error in the record the judgment of the court below is affirmed.

Judgment affirmed.

JUDGE UPTON, having tried the case in the court below, took no part in this decision.

PETER SCHRINER

V.

JOHN PETERS.

Contracts—Action for Service Fee of Stallion—Counter-claim—Contract Payable in Trade—Demand and Refusal to be Shown.

A contract, made payable in trade, without time or place for payment, is payable on demand or within a reasonable time, and at the residence or place of business of the promisor, and before the promisee is entitled to a money judgment against the promisor for non-performance, he must show a demand on his part and a refusal on the part of the promisor.

[Opinion filed August 3, 1891.]

APPEAL from the Circuit Court of Carroll County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Mr. J. M. HUNTER, for appellant.

Mr. GEORGE L. HOFFMAN, for appellee.

HARKER, J. This suit was commenced by appellant before a justice of the peace, to recover \$15 for the service of a stallion for the season of 1889. A judgment being recovered for that sum, appellee prosecuted an appeal to the Circuit Court, where a trial resulted in a verdict, and judgment for \$30 in favor of appellee on his counter-claim against appellant. There was no denial of the horse's services for 1889, and the entire contention was over the counter-claim.

It appears from the evidence that in an exchange of lands made by the parties to the suit in May, 1888, appellant was to pay appellee a difference of \$145—\$100 in cash, and \$45 in the service of his stallion at the rate of \$15 for each mare served. Appellant testified that the service was to be without the insurance of foal, and appellee testified that the service was to be with the insurance of foal. No time was fixed for the service, but three mares of appellee were served by the appellant's horse in 1888, which appellant claims discharged his obligation. Neither service resulted in foal, and appellee claims that he was entitled to other and further service of the horse until three foals should be obtained. The only service that was fruitful was that of the mare served in 1889, the one for which appellant brought suit. The jury evidently adopted appellee's contention that the contract was to be service with the insurance of foal, and as they rendered a verdict of \$30 in his favor, considered the obligation of appellant discharged only to the extent of \$15. If such was their view of the contract, their verdict should have been limited to a finding for appellee without damages against appellant. As the contract or undertaking of appellant was the performance of service, and not the payment of money, and no time was limited within which the service was to be performed before appellee would be entitled to a judgment, he should show that he furnished the means of performance by bringing his mare to appellant's horse within a reasonable time, and appellant refused the service.

A contract payable "in trade" without time or place for a payment, is payable on demand, or within a reasonable time, and at the residence or place of business of the promisor; and

McGillis v. Willis.

before the promisee is entitled to a money judgment against the promisor for non-performance, he must show a demand on his part and a refusal upon the part of the other. *Rice v. Churchill*, 2 Denio, 45; *Lobdell v. Hopkins*, 5 Cowen, 516; *Vance v. Bloomer*, 20 Wend. 196; *Woods v. Dial*, 12 Ill. 72; *Wehr v. Rehwoldt*, 107 Ill. 60.

Recognizing this principle of law, appellee insists that no special demand was necessary because appellant had expressly refused performance. The record will be searched in vain for evidence of such a refusal. The nearest approach to it was the bringing of suit for the service of the horse in 1889. Indeed it appears from appellee's own testimony, and that of his witness, Reuben Peter, that as late as 1889 appellant was insisting upon appellee bringing over his mare that he might perform his part of the contract. The appellee's third instruction entirely omitted the consideration of demand and refusal, and the giving of it was for that reason, error.

Reversed and remanded.

W. A. MCGILLIS ET AL.

V.

AUSTIN WILLIS.

Drainage — District Commissioners — Action against for Damages Resulting from the Building of a Dam—Res Adjudicata—Quasi Public Corporation.

1. A drainage district is a public, involuntary, *quasi* corporation, and in the absence of special enactment is not liable for the wrongful and unlawful acts of its agents done in the execution of corporate duties and powers.

2. Where the drainage commissioners merely acted under the order of the County Court in letting the contract for the work complained of and had no immediate supervision of its execution, they are not personally liable for injuries resulting from the prosecution of the work.

3. In an action brought to recover damages for the overflow of plaintiff's land, resulting from the construction of a dam, where it clearly appeared that the erection of the dam was necessary to the feasible and economical

prosecution of the work of the drainage district, it is *held*: That the plaintiff's claim for damages was, or might have been, passed upon in the assessment of damages in the drainage proceedings, and that the matter was *res adjudicata*.

[Opinion filed August 3, 1891.]

APPEAL from the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding.

Messrs. J. E. LEWIS and A. C. BARDWELL, for appellants.

The injury complained of must be presumed to have been taken into account by the jury in assessing damages and benefits. *Doyle v. Baughman*, 24 Ill. App. 614.

Statutory assessment of compensation will cover all consequential damages occasioned by the construction of the work, except such as may result from negligent or improper construction, and for which action at law will lie. *Cooley*, Const. Lim., 712 (4th Ed.).

Assessment of damages in condemnation proceedings embraces all past, present and future damages which the improvement may reasonably 'produce. *C. & E. I. R. R. Co. v. Loeb*, 118 Ill. 213; 1 *Sutherland on Damages*, 191; *Trenton Water Power Co. v. Chambers*, 13 N. J. Eq. 199.

The final award in condemnation proceedings is a bar to an action for any injury which the appraisers could have legally estimated, irrespective of their action upon claims for injury, or even their knowledge or ignorance of its existence. They are conclusively presumed to have performed their duty, except in a direct proceeding to set aside the award or on appeal. *Pierce on Railroads*, 177, citing numerous authorities.

In assessing damages for lands taken for the construction of a canal or reservoir therein, injuries to the residue of such lands arising from seepage or leakage should be anticipated, and damages for the same should be included in the original assessment, and no subsequent recovery for such injuries will be allowed, unless negligence or unskillfulness be shown. *Denver Irrigation & Water Co. v. Middaugh*, 12 Colo. 434 (21 *Pacific Rep'r*, 565).

In condemnation proceedings evidence is competent tending to show the mode of constructing the work and the probable manner of its use. *Mix v. B. L. & M. R. R. Co.*, 67 Ill. 319; *Suver v. Chicago, S. Fe & C. R. R. Co.*, 123 Ill. 297; *Jacksonville & S. R. R. Co. v. Kidder*, 21 Ill. 131.

And plans must be adhered to. *Peoria & R. I. R. R. Co. v. Birkett*, 62 Ill. 332; *Pierce on Railroads*, 229; *Chicago, S. Fe & Col. R. R. Co. v. Phelps*, 125 Ill. 489.

And the jury may take into account injury likely to be done by blasting. *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208.

The proposition hardly needs to be mentioned that assessment of jury unappealed from is conclusive. *People v. Meyers*, 124 Ill. 95.

Where that which constitutes the actionable wrong is permitted on public grounds, but on condition that compensation be made, and the statute provides an adequate remedy whereby the party injured may obtain redress, the inference that this was intended to be the sole remedy must generally be conclusive. So held in many cases where land has been taken for public use under eminent domain law. *Cooley on Torts*, 652; *Dodge v. Commissioners*, 3 Met. 380; *Pierce on Railroads*, 177.

This may not be the law when the body authorized to institute proceedings fails to do so, but where the corporation, by following the statute, tenders to the land owner a complete remedy, we insist he can not again have his day in court for anything but the negligent doing of the work.

By the "Levee Act" commissioners are expressly given full power to do all necessary work, including erection of dams, but if the cost of the work will exceed \$500, the work must be let by contract. (Sec. 36.) It would seem that this contemplates that the contractors shall succeed to the powers of the commissioners in these particulars.

The drainage district is not liable for the injury complained of.

It is familiar law that "unless made so by express enactment, counties, townships, school districts and road districts

are not liable to persons injured by their agents in the execution of corporate duties or powers." *Symonds v. Clay County*, 71 Ill. 357.

Drainage districts are classed with these bodies in not being required to give bond on appeal. *Commissioners v. Kelsey*, 120 Ill. 482.

Drainage districts are to be regarded as mere public, involuntary *quasi* corporations. They have no means of raising funds to pay damages, and their liability for the acts of officers is no greater than that of towns, road districts, etc. *Elmore v. Drainage Com'rs*, 32 Ill. App. 123; affirmed in Supreme Court and reported in 135 Ill. 269.

MESSRS. MORRISON & WOOSTER, for appellee.

The case of *Doyle v. Baughman*, 24 Ill. App. 614, cited by counsel, throws no light on this case. It can hardly be denied that a jury in assessing damages would take into account the fact that dirt taken from the ditch must be deposited along its sides, and such damages must have been taken into account by the condemnation jury.

All other cases cited by counsel recite only the well known rule of law that such damages as naturally and probably flow from the construction of the proposed work must be taken into account by the condemnation jury.

In *Hiram Jones v. C. & Iowa R. R. Co.*, 68 Ill. 380, it is said: "The amount allowed should be sufficient to cover all the actual damages occasioned by reason of the construction of the road, for the land taken and for all physical injuries to the resident, * * * but nothing should be allowed for imaginary damages, or such remote or inappreciable damages as the imagination may conjure up, which may or may not occur in the future."

The above case is cited approvingly in *L. S. & M. S. Ry. v. C. & W. I. R. R.*, 100 Ill. 30; *C. B. & N. Ry. Co. v. Bowman*, 122 Ill. 595.

The commissioners or jury may take into consideration all incidental loss * * * and all damage that may be known or reasonably expected to result from the construction and

operation of the work. 3 Sutherland on Damages, 438; Missouri R. R. Co. v. Haines, 10 Kas. 439; Redfield on R'ys, 6th Ed. 304.

Only such damages as may be reasonably expected to flow from the construction and operation of the proposed work are to be taken into account by a condemnation jury. James Mix v. LaFayette, B. & Miss. R. R. Co., 67 Ill. 319; C. & A. Ry. Co. et al. v. S. & N. W. R. R. Co., 67 Ill. 142; Carman v. S. & I. Ry. Co., 4 Ohio St. 399.

HARKER, J. In the year 1887 Inlet Swamp Drainage District was organized under the drainage and levee act, approved May 29, 1879, for the purpose of draining and reclaiming some thirty thousand acres of swamp land in Lee County. All statutory requirements as to fixing boundaries, locating ditches, and assessing damages and benefits to the lands of the district were performed. The drainage commissioners contracted the work of ditching as authorized by statute. The natural outlet for the district was Inlet Creek, which was by the plans and order of the County Court made the main ditch. In order to float the dredge boats used for removing the dirt and rock to the depth required, the contractors in April, 1888, constructed a dam across this stream about one mile below appellee's lands in such manner as to back up the water and cause their overflow. With the exception of an occasional opening to let out the water the dam remained until the month of August following, when it was removed. By reason of the construction of the dam and the consequent overflow of water the appellee claimed that large portions of his land had been rendered unfruitful to him that year, and brought his action on the case against the drainage district, the drainage commissioners and contractors. A trial resulted in a verdict and a judgment against all the defendants for \$263.33. Appellee based his claim for damages upon the "wrongful" act of constructing and maintaining the dam. A drainage district is not liable for such injury. It is a public, involuntary, *quasi* corporation, and in the absence of express enactment, not responsible for the wrongful and unlaw-

ful acts of its agents done in the execution of corporate duties or powers. Cooley's Const. Lim., 247; Elmore v. Drainage Com'rs, 135 Ill. 269.

The verdict and judgment against the commissioners personally were unwarranted by the evidence. Acting under an order of the County Court they merely let the contract for the work. They had no immediate supervision of the dam. They took no part in its construction. If contractors in the performance of drainage work adopt an unlawful method, and one resulting in injury to an individual, his remedy is against the contractors alone, unless it can be shown that the commissioners advised or encouraged such unlawful method.

The unwarranted verdict and judgment against the drainage district and the commissioners personally are sufficient grounds for reversal; but we are also of the opinion that appellee has no legal cause of action against the contractors. Four hundred and eighty acres of his land (including the land overflowed) were within the district. It appears from the evidence that a jury, as authorized by law, assessed the damages and benefits that would result to the land from the drainage work. Appellee appeared as an objector on the confirmation of the assessment, and was heard or could have been heard as to such damages as would naturally and probably arise in a practical construction of the work. The evidence in this case clearly demonstrates that the erection of the dam was necessary to a feasible and economical prosecution of the work. Immediately and for a long distance above the dam, the plans required the removal of dirt and the blasting and removal of rock several feet in depth and several feet in width for the "main ditch." To carry the machinery for drilling and removing the rock it was necessary to have the dredge boats floated. This could only be done by the construction of a dam. If the erection of the dam was necessary, then it must be presumed that when the jury in the drainage proceedings viewed the land for the purpose of assessing benefits and damages, they considered whether such a dam and the consequent backing up of the water would damage appellee's land, and if so, fixed the amount. If, as a

Luthy v. Waterbury.

matter of fact, the jury did not consider such damages, it was the privilege of appellee when he appeared as an objector to offer evidence in every detail shown by the profiles and plats, and demonstrate the effect, and have the damages allowed him. He has had "his day in court" as respects such damages.

The principle of *res adjudicata* embraces not only what damages were actually determined in the former proceedings, but also such as were properly involved and might have been determined. Freeman on Judgments, 272; Rogers v. Higgins, 57 Ill. 244; Stockton v. Ford, 18 How. 418; Hamilton v. Quinby, 46 Ill. 90; Rnegger v. I. & St. L. R. R. Co., 103 Ill. 456.

In this view of the case the judgment must be reversed and not remanded.

Judgment reversed.

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FERDINAND LUTHY AND CHARLES T. LUTHY, CO-
PARTNERS,

V.

JAMES M. WATERBURY AND CHAUNCEY MARSHALL,
COPARTNERS.

Sales—Action on Contract for Sale of Binding Twine—Construction of—Guaranty of Quality—Provisions as to Sales by Seller to Others at Less Price than Provided in Contract—Instructions.

1. In an action on a contract for the sale of binding twine, which contained a guaranty of the quality of the twine sold, where the vendor claimed that the twine was not up to the guaranty, it is *held*: That the defendants had received all the allowance in the verdict and by *remittitur*, to which they were entitled under the evidence.

2. Under a clause in the contract which provided that in case of sales to others during the season at a less price than that fixed in the contract with defendants, the defendants should be entitled to a corresponding reduction, it is *held*: That the evidence failed to show that sales had been made at a less price as claimed.

3. A clause in the contract provided that should the appellees, or another company named, sell twine during the season at a less price than that named in the contract, the appellees would make a corresponding reduction: *Held*: That this clause did not apply to a sale already made, and second, that it had no reference to more favorable terms given to appellants by the other company named, by way of receiving back unsold twine at the end of the season.

[Opinion filed August 3, 1891.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

This is an action of assumpsit brought by the appellees against the appellants, Luthy & Co., on a promissory note, dated May 10, 1889, for \$19,000, payable November 10, 1889, and also upon an open account for \$2,869.92. To this the defendants oppose a plea of the general issue and two pleas of set-off. Upon a trial by the jury the appellees obtained a verdict for \$21,798.92. The defendants moved to set aside the verdict and for a new trial, whereupon the appellees entered a *remittitur* for \$858.92 on the verdict, and the court thereupon denied the appellants' motion, and rendered judgment against the appellants for \$20,939.60, from which the appellants prayed an appeal to this court.

It appears from the evidence in the case that with what the jury allowed and the *remittitur*, the appellants must have obtained a set-off against appellees' claim of \$1,522.32; but with this set-off the appellants are not satisfied, and claim a large amount in addition. It appears that on the 4th day of April, 1889, the appellees, residents of the city of New York, entered into a contract in writing with the appellants, residents of the city of Peoria, Ill., whereby the appellants agreed to sell to appellees, binder twine at Peoria, Ill., Omaha, Neb., and various other points in the northwest, as per list attached to the agreement, and amounting to 424,548 pounds at thirteen cents per sisal, either white or stained; fourteen cents for mixed, tagged standard half and half, or standard manila; fifteen cents for pure manila, tagged pure manila or stand-

Luthy v. Waterbury.

ard manila, free of all charges for freight, storage, insurance and other expenses until the warehouse receipts were turned over for same to appellants, etc. The money was payable by note on receipt of the invoice, one-third September 10th, one-third October 10th, and one-third November 10th, 1889.

The appellees agreed and guaranteed that the twine was in good condition and a merchantable article, and further guaranteed that should the National Cordage Company or the appellees sell twine during the season at less prices than the above they would make a corresponding reduction on the twine. It was further agreed that the contract should not be considered to in any way affect the contract existing between the National Cordage Company and the appellants. It was further agreed that if the appellants should be in want of more twine for that season, they were to give appellees the preference of their future orders at above prices of corresponding market rate at the time, for 250 tons additional twine. Prior to that time, on the 29th day of March, 1889, an agreement had been entered into between the appellants and the National Cordage Company, a corporation of the city of New York, whereby the latter agreed to sell to the second party 1,000 tons of binder twine on the following conditions: Prices per sisal twine to average 500 feet per pound, thirteen and one-half cents f. o. b. New York; prices for half and half twine to average 550 to 575 feet per pound f. o. b. New York; prices per manila twine to average 600 feet to the pound, fifteen and one-half cents f. o. b. New York. Appellants to have privilege of ordering twenty-five per cent of the above quantity, to be made up out of mixture of five to ten per cent of manila, balance sisal, to average about 575 feet per pound at thirteen and one-half cents f. o. b. New York, special tag to be furnished for same at the expense of appellees, * * * sixty days credit or cash in ten days less one-half per cent, four months extra credit if desired at six per cent per annum.

The appellees agree if they or any members of the National Cordage Company during the season make lower prices or more favorable terms, which would be equivalent to lower

prices to any one, that a corresponding reduction would be made to appellants on the contract. It was further agreed that appellees should take back all twine unsold and remaining in the second party's hands at their principal place of business only, on or before the 1st day of November next following, at prices paid. Twine to be delivered to first party on or before that time, in good order and without expense, at points above designated. Prices are always to be considered f. o. b. New York, and freights to be added to deliveries from western mills to equalize such deliveries. The sellers agree that after their total sales this season have amounted to 12,000 tons, that they will sell no more twine during this season of a less price than one cent per pound advance on prices named. James M. Waterbury, while being a member of the firm of Waterbury & Co., was at the same time president of the National Cordage Company, and a friendly feeling existed between the appellees and the National Cordage Company. It appears from the evidence that there was returned 731,100 pounds, and that there was 500,000 pounds additional not returned. When the appellants came to settle with the National Cordage Company, they paid them twelve and one-half cents for sisal, twelve and one-half for mixed, and thirteen and one-half for standard manila.

This reduction was given on this twine because there had been a decline in the price of twine. It appears from the testimony of Charles L. Luthy, one of the appellants, that the settlement was based on the fact that there had been a reduction in the price.

Messrs. PUTERBAUGH & PUTERBAUGH, for appellants.

Messrs. McCULLOCH & McCULLOCH, for appellees.

LACEY, P. J. One of the complaints made by appellants and insisted on for cause of reversal is that the appellees are liable on the contract of warranty of the good and merchantable condition of the twine, insisting that it was not in as good condition as warranted. It must be admitted that the evidence

Luthy v. Waterbury.

to some extent tends to support the claim of appellants in that regard, especially as to the condition of twine stored at Lisbon, Valley City, Osnabrook and Aberdeen, but we think there was very little evidence of any serious defects in the twine stored at any other points, and it also appears that there were some small sums of money due appellants for other items of accounts, amounting to seventy odd dollars. As to those items, or so many of them as the jury may have seen proper to allow, and including the damages resulting from a breach of the warranty as to the condition of the twine, we think all are covered by the amount of the reduction in favor of appellants' claims made by the jury and the *remittitur* entered by appellees. It will not be necessary for us to go over and canvass the evidence in detail to show that the appellant can not reasonably claim on that score more than they have been allowed, and indeed they might without doing any violence to the evidence have been allowed less. The twine that appellants purchased was carried over from the last year and both parties must have known that it would not be in the excellent condition of new twine; and such we think was not contemplated by the parties to the contract. For example, the 137,000 pounds of twine in appellants' own warehouse in Peoria is objected to as not being up to the warranty. But as to this twine, Charles L. Luthy, one of appellants, says in his testimony: "I don't think the twine in our warehouse was in good condition, but it was not as bad as it might have been. Some of it was in bad condition. For carried-over twine it was in fairly good condition. I think it was fairly marketable." It will be observed, too, that the contract price of this old twine was less by one-half cent per pound and the cost of freight from New York than the new twine purchased of the National Cordage Company in New York, and this difference no doubt was made on account of the former being old twine and the latter new, and therefore more marketable than the old. The same may be said of much of the old twine purchased and stored in the Western States. Therefore we think there is no error in the record as regards the credits received on account of the claims above named.

The main supposed defense to a portion of the appellees' cause of action arises under the following clause in the contract with the appellees for the sale of the twine, to wit: "The party of the first part hereby guarantees that should the National Cordage Company or the party of the first part sell twine during the season at less prices than the above, they will make a corresponding reduction on this twine." It is now insisted and was on the trial in the court below that the warranty contained in the above clause in the contract failed in this, that the appellees as well as the National Cordage Company sold twine in specific instances during the season of 1889 at less prices than those mentioned in the contract, and that therefore, under the guaranty, the appellants had the right to set off such reduction against the claims of the appellees sued on, to the same extent per pound of the twine sold as was made during the season in other contracts, either by the National Cordage Company or appellees. And this is the question we will now consider.

The sales whereby it is claimed appellees reduced the price of binder twine are two: one made to Smith Wagon & Implement Company of Minneapolis, Minn., of 400,000 pounds of twine, of which all was returned to appellees except 21,078 pounds, and the other was a sale of 500 pounds of twine to L. Freeman & Company, Grand Forks, Dak., at fourteen and one-half cents per pound for manila. There are other sales claimed in the argument to have been made by appellees wherein prices were reduced below the prices named in the contract in question, but upon examination we find no reduction, and we will, therefore, not take up our time in going over them. There was one contract and sale made by the National Cordage Company in which it is insisted that the price was reduced in various ways below that contained in the purchase made by appellees in question, to wit, the contract and sale made by said National Cordage Company to appellants of 1,000 tons of twine of March 29, 1889, mentioned in the statement of the case above. We will now proceed to consider the testimony and the law embodied in the instructions as applicable to the facts in the above cases of sales or supposed sales of binder twine.

Luthy v. Waterbury.

The first we shall notice is the alleged sale of twine to the Smith Wagon & Implement Company. By a reference to the record we find there was evidence produced before the jury by the witnesses Waterbury and Marshall, to the effect that the 400,000 pounds of twine claimed to have been sold to the Smith Wagon & Implement Company was in fact not sold to it but sent in consignment to be sold on a commission of five per cent, and that when a settlement was made there was found to have been sold only 21,078 pounds of the twine by the Smith Wagon & Implement Company and the balance returned, and three-fourths of a cent a pound was allowed in addition to the commission on a settlement with the consignees. If this was the nature of the transaction, the jury being the judges of the facts so far as that transaction was concerned, they were justified in finding that there was no sale at less prices per pound for the twine furnished than was named in the contract between appellants and appellee in question. If the Smith Wagon & Implement Company were the mere agents of the appellees and the transaction between it and appellees was not an evasion intended to protect the appellees from forfeiture on appellants' contract, then there was no sale within the meaning of the contract, and the jury, we think, was justified in its verdict in finding there was no evasion. It appears by the evidence of James M. Waterbury that the three-fourth cent per pound reduction on the twine consigned to the Smith Wagon & Implement Company was made because it could not make collections on the amount sold and only on the amount sold, and this was made, not in pursuance of any previous understanding, but in closing up the transaction. If this be so it would not be a sale within the meaning of the contract in question. We now come to the consideration of the sale made to L. Freeman & Company of the 500 pounds of twine made September 1, 1889. This sale does not appear to be much relied on by counsel for appellants as showing a reduction of prices as contained in appellants' contract, but still it is claimed and we will consider it. The evidence shows, or at least tends so to do, that the twine season means that portion of the year during the continuance

of harvest, in which the twine is used for the purpose of binding sheaves of grain, and commences about January 1st and ends about August 1st, after harvest. James M. Waterbury and Chauncey Marshall both testify to this, and Ferdinand Luthy, one of the appellants, testifies that the word "season" used in the contract "would apply to twine disposed of during the year 1889. It varies some in different parts of the country. * * * In Dakota we have binding twine used after September 1st. Sometimes the harvest is not over there until September 1st. * * * The harvest is generally over by September 1st. I consider the season over when the harvest closes," etc. This sale of the 500 pounds of twine was in itself a very insignificant matter, and, as we think, the appellants failed to show that it was made during the season, but rather after its close, and could not possibly affect the market of twine during the season. We suppose this clause was inserted in the contract for the purpose of protecting appellants in their retail or jobbing trade, and to compensate them by reducing the purchase price of their twine for what they would or might lose by reason of any reduction in the wholesale price of twine by appellees or the National Cordage Company, and in fact it was intended to put appellants on an equal footing as respected the price of twine during the season with the other customers of appellees and the Cordage Company, so that they might be enabled to compete in the retail or wholesale market with any other purchasers of twine from them. Considering the sale of the 500 pounds of twine to L. Freeman & Co., and the time and circumstances, it would seem to us that it could not be considered or held to be a substantial breach of the contract, or in other words, a selling during the season at less prices than those mentioned in the contract, and the jury was justified in its verdict in that respect.

We will now come to consider the last complaint, and that is the supposed reduction of the prices in the National Cordage Company's contract with appellants, dated March 29, 1889, set forth in the statement of the case herein. After due consideration of the matters we are of the opinion there could

Luthy v. Waterbury.

be nothing claimed on that account. It is claimed by appellants' counsel that after the close of the season in the month of February, 1890, the Cordage Company reduced the price of twine all around on an average of one cent per pound on the contract with the appellants; that this was done under an indefinite promise as to amount made to appellants in July, 1889, and was done because, as the Cordage Company informed them, they were reducing prices, and it was a voluntary matter on the part of the company and not upon any demand made by the appellants. For this reason it is insisted that the price in appellants' contract should be reduced correspondingly, and further, inasmuch as by the terms of the contract with the Cordage Company with appellants, the said company was to buy back all the twine unsold at the end of the season at the contract price, and the contract with appellees did not so provide; that that was more favorable in its terms to the amount of one cent per pound on the price of the twine, and hence they should be allowed a like reduction on the twine purchased of appellees. It does not seem to us that this claim can be sustained, or that the contract with appellees will bear any such construction. The contract with the National Cordage Company was dated four days prior to the contract with appellees, and it was known to both parties at the time appellees' contract was made, that such contract had been made, and what its terms were, and especially that it provided for the return of the unsold twine. Appellees' contract did not so provide. If appellants' contention be correct, then the moment appellees' contract was executed, notwithstanding it had no such provision in it, appellants, by virtue of the clause to reduce in case other contracts of sale by appellees or the Cordage Company thereafter to be made, reduced the price of twine, were entitled to a corresponding reduction instantaneously; and according to appellants' contention there should have been a credit entered on appellees' contract with appellants then and there, to the extent of the value of the advantage there was in the privilege to return, as was given in the Cordage Company's contract, if the price thereby was reduced below those in appellees' contract. We think the contract

with appellees had reference to the sale to be made, if any, by them in the future, and had no reference to past sales, such as the one already made by the National Cordage Company. As to that claim for reduction, without reference to any other reason, we will say that there can be no basis for it. We are inclined to hold and think that as to the National Cordage Company's contract, and all that was, or could be done under it, without changing its terms thereafter, it could not affect the clause in appellees' contract in reference to the reduction of prices for twine. It should in our opinion be held to mean sales to other parties than appellants. The very object of such a clause, as we have before said, was to protect appellants in their trade in the resale of the twine. How, it may be asked, could appellants be injured by a subsequent sale to themselves by appellees or the Cordage Company of twine at a reduced price, provided no other such sales were made to other parties. A reduction of the price, even a gift of the twine, by the National Cordage Company or appellees, could only work to their advantage, not their disadvantage, and the same would be true as to any reduction by means of a new contract of prices named in the National Cordage Company's contract in question, even if made during the season, of which there is no evidence. But from the evidence we think the jury was justified in regarding the rebate-ment of the one cent per pound of the twine sold to appellants by the Cordage Company, as not a selling of the twine within the meaning of appellees' contract, but a mere rebate-ment, or gratuity, not agreed upon till after the season was over. Again, the contract of the Cordage Company made provision in terms for reduction in certain contingencies, and the sale was made on those conditions. It required no new agreement between appellants and the Cordage Company to reduce, to entitle appellants to a reduction; the only instance required was that the Cordage Company should make sale to other parties at less prices than named in appellees' contract with them, then the reduction followed as a matter of right. If the prices named in the Cordage Company's contract with appellees became reduced under its terms by reason of sales

Luthy v. Waterbury.

or reduced prices to other parties and not by any new agreement, was that not by virtue of the terms of that contract and sale? If that be so, this contract antedated the one with appellees, and the sale of the twine was made prior to the contract with the latter. The latter contract only provided against sales made after its date, and not those made prior thereto. If the contract to sell and the delivery of the twine during the selling season under the terms of the contract, in pursuance of such contract, be regarded as the sale, then the Cordage Company's sale in the manner the contract of sale provided, was made when dated, and can not be regarded as a new sale. It would be no different than if the contract with the Cordage Company had been originally for a less price per pound for twine than the one subsequently made with appellees. Nor would the fact that the National Cordage Company submitted to a reduction in prices be evidence against appellees, that such company had sold for less prices than were named in appellees' contract. If the Cordage Company, reduced prices in sales other than the sales to appellants below those in appellees' contract, it was the duty of appellants to show it, and such reduction when proved would be a basis for reduction of appellees' prices named in the latter's contract. We, for the above reasons, conclude that the contract, in no particular, of appellant with the Cordage Company, was in view of the parties when the contract now in question was made, and the former was not embraced within its terms.

The appellants insist that a proper construction of the contract by which it was agreed that "in case the National Cordage Company or the party of the first part (should) sell twine during the season at less prices than the above, they will make a corresponding reduction on the twine," would embrace all other advantageous terms of sale by reason of which the buyer may be indirectly benefited, such as the privilege to return the unsold twine and the giving of longer time to pay for the twine without interest. But we are inclined to think such favorable terms as mentioned can not be fairly considered to be embraced in the terms "less price."

The word price, as is generally understood, embraces the

thing paid in consideration for the article sold, and when speaking of the price paid at Peoria for an article shipped from New York City, the cost of the freight may be added to the cost in New York to show the price or cost of the article in Peoria; but we think the privilege to return could not reasonably be embraced in the term "price" of the article. It will be seen by reference to the contract with the National Cordage Company that the contract in regard to lowering the price of the twine is quite different from the terms of the contract on the same subject with appellees. The second section of the former contract provides, the first party hereby agree, "That if they or any of the members of the National Cordage Company during the season make lower prices, or more favorable terms, which would be equivalent to lower prices, to any one, that a corresponding reduction be made to the second party on this contract."

Appellees' contract only guarantees against the selling of twine during the season at less prices. We think there is quite a distinction to be drawn between the two contracts as we have indicated above, and this, we think, embraces the question of the time of payment as well as the agreement to allow unsold twine to be returned. The fifth and sixth instructions given for appellee are complained of. They hold that the warranty of the good condition and merchantable character of the twine provided for in appellees' contract is to be taken to refer to the time when the said contract was made, and that if the twine became in a bad condition afterward, the warranty would not embrace it. We find by reference to the contract that the warranty refers to the condition of the twine at its sale and not to its condition at any future time. Of course if the twine was in bad condition at the time appellants obtained possession of it, it might be proved, tending to show that it was in that condition at the date of the contract, unless the evidence should show to the contrary. But we think that the defendant got the benefit of such evidence and we find by reference to the appellants' first instruction given by the court that they refer to the warranty as taking effect at the date of the contract, the same as appellees' instruction; therefore the

Luthy v. Waterbury.

appellants are not in a condition to raise such an objection to the said instructions five and six. Also appellants object to the giving of the appellees' fourth and eleventh instructions. The following portion of the fourth instruction is complained of, to wit:

"To pay no regard to the claim made by defendants that there was an advantage accruing to the purchaser by reason of there being a provision in the contract whereby he was accorded the privilege of returning to the seller all twine remaining unsold at the end of the season, unless the jury believed from the evidence that such privilege of returning affected the market value of the twine sold with such privilege."

It will be seen from what we have said above that with reference to the contract here in question the instruction is not erroneous and was as favorable to appellants as they could ask, and therefore the refusal of the court to give the appellants' fourth instruction asked was proper.

The eleventh instruction is as follows: "Although the jury may believe that the National Cordage Company, or the plaintiffs, made on settlement for sales previously made of other twines than those sold by the plaintiffs to the defendants, such settlements would not amount to sales within the meaning of said contract, if made after said contract had been fulfilled on the part of the seller, unless in pursuance of a prior promise, under valuable consideration, nor would such settlement amount to sales, unless made before completion of the contract by the seller, unless the same was made upon a previous, and upon a good and valuable consideration; that is, a mere concession by the seller to the buyer, on a settlement of a past sale, which the seller is under no legal obligation to make, can not be held to affect the original terms of the sale."

We think the law as we have above indicated was properly given in this instruction. We have now considered all the questions raised by appellants as grounds for reversal, and finding no error in the record, the judgment of the court below is affirmed.

Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—AUGUST TERM, 1890.

WILLIAM H. HERDMAN ET AL.
V.
SAMUEL D. COOPER, SHERIFF, ET AL.

Homestead—Real Property—Sale of under Execution—Irregularities of—Bill to Set Aside—Practice.

1. A husband can have a homestead in his wife's property to the same extent as if the title to the property was in himself; he can have but one homestead. If it attaches to property owned by the wife, he can not have another in property, the title to which is in himself.

2. Where a debtor resides upon a lot worth more than \$1,000, to it alone his homestead attaches, although other lots are within the same inclosure and used for family purposes. The dwelling house is the foundation fact upon which the homestead must stand.

3. Upon a bill filed to set aside the sale of a lot upon the ground that complainants were entitled to a homestead therein, and also on account of the alleged irregularity of such sale, this court holds that the fact that a person named bid off said lot at the sale, under a certain execution, did not make the same complete as to him, in the absence of payment to the sheriff; that upon failure to do so, it was the duty of the sheriff to readvertise the property for sale; that his return of the execution, unsatisfied, to the office of the clerk, did not relieve him from his duty to hold the same until he had disposed of the levy by a sale; that in such case should the property fail to bring upon the resale the amount offered upon the first sale thereof, the first purchaser would be responsible for the difference; and declines to interfere with the decree for the defendants.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of Jefferson County; the Hon. WILLIAM C. JONES, Judge, presiding.

William H. Herdman and his wife were married in 1850. At that time Mrs. Herdman was owner, as heir of her father, of an undivided third of lot 3, block 18, in Mount Vernon, and subsequently she became the owner of another undivided third of the lot, and her husband the owner of the remaining third. They moved into the house on the lot in 1851 and have continued to occupy it as a homestead ever since. In 1854 William H. Herdman became the owner of two-thirds of lot 2 in the same block, and later on the owner of all the lot except one-eighteenth. When Herdman became the owner of the two-thirds of lot 2, he took possession of the lot. The lot was used by his family as a fruit and vegetable garden, and subsequently he erected a barn, a part of which, a cow shed, was on lot 3 and the remainder on lot 2. The value of lot 3 with improvements was variously estimated, but the weight of the testimony shows that it was worth more than \$1,000. In July, 1866, the Herdmans mortgaged lot 2 to Samuel H. Watson, by which the homestead right of the Herdmans, if any, was released. This mortgage was foreclosed and the premises sold February 13, 1887. A. Rightnowar recovered a judgment against Herdman at May term, 1888, of the Circuit Court, and redeemed from the foreclosure sale, and the property was again sold August 11, 1888, for the amount of the redemption and the Rightnowar judgment and costs. Appellee McLaughlin held a judgment against Herdman on which he sued out an execution, and redeemed from the sale under the Rightnowar execution, paying to the sheriff the amount necessary to redeem from the Rightnowar sale, and a levy was made on lot 2 under the McLaughlin execution, and the property was again advertised for sale under the McLaughlin execution, and at such sale, September 15, 1888, the property was struck off to McLaughlin for the sum of \$307. The sheriff recites in his return on the execution, that after waiting eight days for McLaughlin to complete

his purchase. he made out and presented to McLaughlin a certificate of purchase, and he still refusing to complete the same, he returned the execution not satisfied.

Afterward, about March 1, 1889, the sheriff took this execution from the clerk's office and readvertised the property under the levy made the previous August, and again sold the property to McLaughlin for \$797.76, being the full amount of the redemption paid by McLaughlin and the amount of his judgment and costs; and sixty days after, there being no redemption from this sale, the sheriff made McLaughlin a deed for lot 2. At both the sales September 15, 1888, and the sale March 30, 1889, William H. Herdman notified the sheriff that he claimed a homestead in lot 2.

On the 29th day of March, 1889, appellant Rightnowar recovered another judgment against William H. Herdman for the sum of \$48.55. The bill in this case was filed by Herdman and wife and Rightnowar, the Herdmans seeking to set aside the sale to McLaughlin on the ground that they had a homestead in lot 2, and also on account of irregularity in the sale of March 30, 1889, and asking that McLaughlin be decreed to complete the purchase at the execution sale of September 15, 1888, reserving to Rightnowar the right of redemption from such sale under his judgment of March 29, 1889.

The Circuit Court dismissed the bill, and the complainants seek to reverse this action of the court by this appeal.

Messrs. POLLOCK & POLLOCK, for appellants.

The Supreme Court has decided that a release of the homestead right as to one creditor does not operate as a release in favor of any other creditor. *Raber v. Gund*, 110 Ill. 581; *Hume et al. v. Gosset*, 43 Ill. 297; *Kingman v. Higgins*, 100 Ill. 319.

The evidence shows conclusively that ever since, in 1854, lots 2 and 3 were within the same inclosure, without anything to indicate a dividing line; that the principal part of the barn, with other improvements for the use of the family, were on lot 2, and the dwelling house, and some other improve-

Herdman v. Cooper.

ments, were on lot 3, and that both lots were occupied and used in common as their homestead. The fact is also shown (though not required in law) that Herdman notified the sheriff before the levy that lot 2 was claimed as homestead. It was then the duty of the sheriff to have summoned three householders to make appraisement, etc.; and not having done so (whether the claim of Herdman is sustained in law or not), the sale and all proceedings under it are absolutely void. *Hartwell et al. v. McDonald*, 69 Ill. 293; *Newman v. Willetts*, 78 Ill. 397; *Muller v. Inderreiden*, 79 Ill. 382; *Moore v. Titman*, 33 Ill. 358, 368, 369.

The homestead right can only be lost by release or abandonment in the mode pointed out by the statute. *Moore v. Titman*, 33 Ill. 358, 368.

Homestead can only be released in the statutory mode or by surrender or abandonment of possession to a purchaser under a conveyance. *Kingman v. Higgins et al.*, 100 Ill. 319.

The husband can not defeat the homestead right of the wife. *Allen v. Hawley*, 66 Ill. 164.

The husband holds the homestead as trustee for the wife and children. *Cassell v. Ross*, 33 Ill. 244; *Patterson v. Kreig*, 29 Ill. 514; *Best v. Allen*, 30 Ill. 30; *Boyd v. Cudderback*, 31 Ill. 113; *White v. Clark et al.*, 36 Ill. 285.

Since the act of 1857, the wife being vested with the homestead right by law, she can be deprived of it in no other way made than that prescribed by law—her release of the right. *Booker v. Anderson*, 35 Ill. 66, 87; *Gage v. Wheeler et al.*, 129 Ill. 197.

In 1861, Sarah Dawson and husband conveyed to William H. Herdman her one-third interest in lot 3, and in 1862, Eliza J. Hinman and her husband conveyed her one-third interest in lot 3 to Mary A. Herdman.

But these conveyances could not divest or tend to divest the estate of homestead vested in Herdmans in 1854 and 1857. The homestead right in the wife and children can not be defeated by any *laches* of the husband and father. He is in law as to this right but a trustee. *Hubbell v. Canady*, 58 Ill. 425.

If he can not defeat the vested right of his wife and children, surely his creditors can not. The mere acquisition of these additional interests would not amount to either abandonment or release, in law.

On behalf of appellants, we contend that where the husband and father is the owner of property, which is adjacent to and occupied and used by the family as of their homestead, the right to hold such property can not be defeated, except by an abandonment or a conveyance in writing, duly executed and acknowledged, relinquishing the right.

In her separate property and earnings a wife is as independent of her husband as if she was a stranger to him. *Thomas v. Mueller*, 106 Ill. 36; *Patten v. Patten*, 75 Ill. 446.

The language of the statute is unmistakable that there shall be exempt from levy and forced sale the lot of ground and buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family. The homestead right of the wife can not be divested except as provided by statute. *Hill v. Bacon*, 43 Ill. 477, 478; *Brooks v. Hotchkiss*, 4 Ill. App. 175; *Johnston v. Dunavan*, 17 Ill. App. 59; *Ayres v. Hawkes et al.*, 1 Ill. App. 600; *Richards v. Green*, 73 Ill. 54.

Where the wife has a homestead right that she has not released, no order can be made by the court for the delivery of possession. *Young v. Graff*, 28 Ill. 20, 29.

It is against the policy of the law as well as against the terms of the homestead act to permit the husband to deprive the wife of her right of homestead; he can make no stipulation that can deprive her of such right. *Thompson on Homesteads*, 172.

Where the residence of the debtor is upon one lot of land and the other farm buildings on another lot, contiguous, the debtor is entitled to a homestead in that portion of his farm on which his buildings are. *Darby v. Dixon*, 4 Ill. App. 187; *Reinback v. Walter*, 27 Ill. 393.

The homestead may consist of several adjoining tracts in one inclosure. *Thornton v. Boyden*, 31 Ill. 200.

It is a question of fact whether adjoining and contiguous

tracts of land forming one body are or are not parcel of the homestead. *Walters v. The People*, 18 Ill. 198.

But by whom must this fact be settled? The statute provides a mode, and that is by the sheriff calling upon three householders, and they are authorized to settle it; the law has not provided any other mode, and in failing to do so, the sheriff disregarded his duty.

For the reasons already stated, we contend that the estate of homestead can not be limited to property held in common or in joint tenancy by husband and wife. We contend further that the estate can only be supported in property held in severalty. The question has not been settled in this State.

It may be contended that this question was considered and settled by this court in the case of *William H. Herdman et al. v. Cooper et al.*, 29 Ill. App. 589. The honorable judge, in delivering the opinion in that case, stated that a hasty examination of the authorities discloses that certain States held the affirmative and others the contrary rule, etc. The decision in that case rested upon another question, and the language of the court we think does not settle this question, and therefore we take the liberty of presenting the question for the consideration of this honorable court. Exemption laws being remedial, beneficial and humane, must be liberally construed, and whenever it does not clearly appear whether the property is embraced within the exemption statute, the debtor should be allowed the benefit of the doubt. *Freeman on Executions*, 208, 209. *Thompson on Homestead Exemptions*, at page 181, professes to give the States in favor of and against the proposition. This affords but very unreliable grounds for an opinion, because he fails to give the constitutional provisions under which these decisions were made. But considering them as given, we think the weight of authority is against the proposition. Our statute is plain and unambiguous that every householder shall be entitled to an estate of homestead in the farm or lot of land owned or rightly possessed, etc., not where he is the owner or rightly possessed in common; but it can mean nothing else than separate ownership. If the Legislature had intended to

invade the rights of a co-tenant, surely they would have made some provision by which the right of third parties might be preserved, and we respectfully urge that to hold an estate in common, subject to the homestead, would be doing violence to the plain language of our statute, and invade the rights of the co-tenant. This honorable court will not hold, we think, in view of the statute, that Mary A. Herdman could not control her interest in lot 3. If she can, then the homestead is necessarily defeated. By allowing it to be occupied by the family in common with her husband's interests, did she surrender her right? We fail to find any rule by which this can be accomplished. The Supreme Court say that as to her separate property, she is as independent of the husband or his creditors as if she were single. On this question we refer the court to the following cases: *Wolf v. Fleshbocker*, 5 Cal. 244; *Bishop v. Hubbard*, 23 Cal. 517; *Camets v. Dupuy*, 47 Cal. 79; *Ward v. Huhin*, 16 Minn. 159; *West v. Ward*, 26 Wis. 580; *Dago v. Sutherland*, 3 Mich. 218; *Sunan v. Walker*, 28 La. 608.

An officer may tender a deed or certificate of purchase, but the proper practice is, in case the purchaser refuses to comply with his purchase, to report the matter to the court and have the purchaser put under a rule to show cause why he should not complete his purchase. *Herman on Executions*, 254, 321 to 330.

In judicial sales, good faith must be observed by officer and purchaser. *Meeker v. Evans*, 25 Ill. 322.

Herdman had a right to effect a redemption. *McCormick v. Wheeler*, 36 Ill. 533.

Where land is sold under execution, and the debtor fails to redeem within twelve months and confesses a judgment in favor of another creditor for the express purpose of enabling such judgment creditor to redeem for the debtor, it is not fraudulent. *Phillips v. Demoss*, 14 Ill. 410; *Karnes v. Lloyd*, 52 Ill. 113.

A judgment debtor may procure another to redeem for him after his right of redemption is lost. *Pearson v. Pearson*, N. E. R. (Ill.) 418.

Herdman v. Cooper.

So that the right of redemption from the sale of the 15th of September, 1888, rested with Herdman and Rightnowar.

As soon as the execution is deposited in the clerk's office the return becomes a matter of record, and is beyond the reach of the officer. *Nelson et al. v. Cook*, 19 Ill. 455.

Here the sheriff made return that he had sold the lot to the execution creditor, and that satisfied the execution as to that lot until the court, for cause shown, should see proper to set it aside, which has not been done, and hence the sale of the 30th of March, 1889, was and is void. *Hughes v. Streeter*, 24 Ill. 649.

Where the plaintiff in execution becomes the purchaser, if no undue advantage is taken of him, he is bound by his bid. *Vanscoyce v. Kinler*, 77 Ill. 151; *Farmers Bank v. Sperling*, 113 Ill. 273.

Mr. GEORGE B. LEONARD, for appellees.

Appellants claim that McLaughlin should have completed the attempted sale of this lot on September 15, 1888, and upon his refusal to pay the amount of his bid and receive a certificate of purchase at that time, that all right of the sheriff, Cooper, was lost (especially after he had returned this execution), to again offer this lot for sale under his levy of this process. This position is untenable for the reason that McLaughlin stood in the same relation to this attempted sale as would a stranger who may have then been the highest bidder, and refused to complete his purchase, that is, upon the property being offered again for sale by the officer, if it should not bring as much as this first bid. McLaughlin, upon a certain contingency, would be liable for the difference between his bid and the smaller sum for which it was finally sold, and the right of the sheriff to again offer this lot for sale can not fairly be questioned, and for authorities on the last points above, see *Hill v. Hill*, 58 Ill. 239; *Thriffs v. Fritz*, 101 Ill. 457; *Maulding v. Steele*, 105 Ill. 644, and cases therein cited.

It is also claimed by appellants that the officer, having returned his execution after attempting to sell this lot in September, 1888, therefore had no right to re-advertise

and sell this property under this levy. This position is also untenable. The levy having been made, the sale could be made at any time within seven years, although the execution may have been returned or even lost before sale. *Breed v. Gorham*, 108 Ill. 81; *Hastings v. Bryant*, 115 Ill. 69; *Barth v. C. Nat'l Bank*, 115 Ill. 472; *Dobbins v. First Nat'l Bank*, 112 Ill. 553; *Holman v. Gill*, 107 Ill. 467; *Parks v. Larochhe*, 15 Ill. App. 354; *Conwell v. Watkins*, 71 Ill. 488; *Reddick v. Cloud*, 2 Gilm. 670; *Willoughby v. Dewey*, 63 Ill. 246; *Phillips v. Dana*, 3 Scam. 551.

This family can not have two homesteads. *Tourville v. Pierson*, 39 Ill. 446; *Raber v. Gund*, 110 Ill. 581.

And this right of homestead extends to every interest in lands that may be taken on execution. *Shackleford v. Todhunter*, 4 Ill. App. 271; *Blue v. Blue*, 38 Ill. 9; *Conklin v. Foster*, 57 Ill. 104; *Tomlin v. Hillyard*, 43 Ill. 300; *Watson v. Saxer*, 102 Ill. 585; *Boyd v. Cudderback*, 31 Ill. 13.

The homestead being in lot 3 this levy and sale was right, although both lots were under the same inclosure. *Hay v. Baugh*, 77 Ill. 500; *Raben v. Gund*, above cited in 110 Ill. 581.

In the case of *Hay v. Baugh*, which is like this one, the court said: "We can see no pretense for holding lot 2 exempt from levy and sale; to so hold would not be to construe the statute but to override and disregard it;" and nothing is found in this objection.

It is claimed by counsel for appellants that we, with the creditor class, are endeavoring to narrow the debtor's rights to a homestead. This we deny, but follow the law, which has given the debtor, who is the head of a family, and residing with the same, a homestead in every character of title to the house and piece of land occupied and rightfully possessed by the householder. But the law does not give to nor have the courts ever held that this right of homestead would enable husband and wife to hold \$2,000 worth of property in two adjoining pieces of property, free from the claims of both their creditors, as a homestead. On the contrary, the holdings of our courts have been to the reverse, by holding that this homestead right could be claimed by either husband or

wife in the property of the other thus occupied, thereby avoiding any necessity for a separate homestead in each of them. Attorneys for appellants claim that, as the statute of 1861 allows a wife to enjoy her property free from any claim whatever, as though she was unmarried, Herdman's right of homestead in this wife's land, or undivided two-thirds interest in lot 3, could not be claimed. We answer this by saying that there was no intention, in passing the married women's act of 1861, to cut off this right of homestead in the wife's land they may occupy as a homestead, nor did they intend thereby to increase the rights of a husband, thus situated, as against his creditors. However, our Supreme Court has repeatedly held that under this statute the husband has this homestead right in the land or lot of his wife thus occupied. *Henson v. Moore*, 104 Ill. 403; *Sanford v. Finkle*, 112 Ill. 146, above cited.

REEVES, J. We think it must be conceded, in the light of the decisions of the Supreme Court of this State, that a husband can have a homestead in his wife's property to the same extent as if the title to the property was in himself. He can have but one homestead. If that attaches to property owned by the wife he can not have another homestead in property the title to which is in himself. In this case, however, it is contended that lots 2 and 3, being in one inclosure, and both lots used in connection with the family, the homestead right or estate attached to both lots, even though the value of lot 3, upon which the residence was located, was more than \$1,000. The case of *Hay v. Baugh et al.*, 77 Ill. 500, would seem clearly to settle this question against appellants. In that case Hay owned lots 1 and 2 in a certain block, both in one inclosure. Lot 1, on which the residence was located, was shown to be worth more than \$1,000. A levy was made, under an execution against Hay, on lot 2, and he set up the same claim as is made by appellants, but the court said: "Was lot 2 a part of his homestead within the meaning of statute? * * * The statute exempts the lot of ground upon which the debtor resides with his

family; not the inclosure, homestead or farm. In this case Hay resided on lot 1, which was worth more than \$1,000 and it was his homestead; citing Reinbach v. Walters, 27 Ill. 393; Tourville v. Pierson, 39 Ill. 447; Hill v. Bacon, 43 Ill. 477; Hubbel v. Canady, 58 Ill. 425. Lots 1 and 2 are separate tracts of ground and are distinct legal subdivisions under the town plat, as much so as are two different quarter sections of land. We can, in this case, see no pretense for holding lot 2 was exempt from levy and sale. To so hold would not be to construe the statute, but to override and disregard it."

Where two lots are in one inclosure, the dwelling house on one and the other used in connection with the dwelling for the use of the family, and the one on which the dwelling is situated is not worth \$1,000, there would be good reason for saying that the homestead right attached to both lots; but when the lot on which the dwelling is situated, is worth more than \$1,000, there is no more reason for saying that the homestead attaches to the adjoining lot in the same inclosure, than there would be for saying that the homestead right would attach to a section of land in one inclosure, where the dwelling house was located on one forty-acre tract of the section. Now, taking the facts of this case under this view of the law, it would seem to follow, as a necessary conclusion, that the homestead right of Herdman is confined to lot 3; and if we should concede that the condition of the title to lot 3 was not such as would support a homestead, we fail to see how such a right could attach to lot 2. The dwelling house, which is the foundation fact upon which the homestead must stand, does not stand upon any part of lot 2. Hence we do not find it necessary to decide the question whether the homestead can be maintained when the title to premises is held in common.

It is also claimed that when McLaughlin bid off lot 2 at the sale under his execution, September 15, 1888, the sale was complete so far as McLaughlin was concerned. This seems to us to be a misapprehension. The sale was not complete until the money was paid to the sheriff, and under the facts shown

Ham v. Peery.

we think it was clearly the duty of the sheriff to re-advertise the property for sale, and his return of the execution to the office of the clerk did not relieve him from this duty. He had made a levy of the execution on lot 2 in the lifetime of the execution; it was his duty to hold the execution until he had disposed of the levy by a sale.

The return made by the sheriff on the execution after the sale of September 15, 1888, shows that it was not completed; that the purchaser refused to complete it. *Bellingall v. Duncan et al.*, 3 Gilm. 477. The most that could result in such a case would be to make the purchaser, if on a re-sale the property did not bring as much as at first sale, responsible for the difference. In this case the property brought more than double the amount it did at the first sale.

Finding no error in the action of the Circuit Court in dismissing the bill of appellant, the same is affirmed.

Decree affirmed.

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108	1168

C. D. HAM ET AL.

V.

RICHARD A. PEERY, FOR USE, ETC.

Garnishment—Bank—Certificate of Deposit—Costs—Judgment—Informality in—Practice—Demand.

1. Garnishees are not liable for costs, but for the amount in their hands belonging to the debtor in attachment; and the attaching creditor can make a demand that will be availing only by suing out the writ and causing it to be served on the garnishees, and from the time of service the money then in their hands, belonging to the debtor in attachment, becomes subject to the legal claims of the attaching creditor against such debtor.

2. The proper practice in such cases is to enter judgment against the garnishee in favor of the defendant in attachment for the benefit of the attachment creditor, and whatever surplus there may be after paying the creditor and costs belongs to the debtor in attachment.

[Opinion filed February 2, 1891.]

IN ERROR to the Circuit Court of Jefferson County; the Hon. WILLIAM C. JONES, Judge, presiding.

Mr. ALBERT WATSON, for plaintiffs in error.

Mr. GEORGE B. LEONARD, for defendant in error.

GREEN, J. Richard A. Peery deposited on February 13, 1890, in the bank of C. D. Ham & Co., \$200, and took a certificate of deposit therefor, of that date, payable to the order of himself, on demand, after date. On February 16, 1890, John J. Manion sued out a writ of attachment against Peery, and on February 18, 1890, plaintiffs in error were served as garnishees of Peery. In the justice court judgment was rendered against the garnishees, in favor of Peery, for the use of Manion. An appeal from this judgment was taken to the Circuit Court, where the cause was tried by the court without a jury. The court found that Peery was indebted to Manion in the sum of \$23.65 and costs recovered in the justice's court; that on March 3, 1890, and after the date of the service of attachment writ from the justice court on the firm of C. D. Ham & Co., that firm had in their possession \$200, which had been deposited by Peery in their bank on or about February 17, 1890, and a certificate of deposit therefor was delivered to Peery by said firm, which was due and payable to him at the time it was so delivered; that said certificate had not been assigned or transferred and was held and owned by Peery on the 3d day of March aforesaid. The court entered the following judgment on its findings: "Judgment is therefore rendered against the defendant, C. D. Ham & Company, and in favor of Richard A. Peery, for the sum of (formerly) \$200, \$23 and the costs of this suit (in the proceedings below as well as in this court) being for the use of John J. Manion. It is therefore ordered that said John J. Manion, as aforesaid, recover of said C. D. Ham & Company the said sum of \$23.65 and costs aforesaid, and that execution issue therefor."

Plaintiffs in error bring the record up to this court and ask us to reverse the judgment for two reasons: first, because no demand was made upon plaintiffs in error for the payment of the money deposited by Peery, and it being one of the con-

ditions of the certificate that said money should be payable to the depositor or his assignee *on demand*, the condition must be complied with, and such demand made, before the bankers can be held liable as garnishees of Peery.

One purpose of the attachment act is, to subject the money, credits and property belonging to the debtor, held by others and not in his possession, to the payment of the legal claims of his attaching creditors. This purpose would be defeated if the contention should be sustained. With equal reason it might be urged the bankers would not be so liable if the demand was made without the return of the certificate, because not only is demand necessary but the money is payable *on the return* of the certificate by the very terms thereof; and it would follow that a debtor, having money on deposit which ought to be appropriated to the payment of his just debts, by refusing to demand the money and return the certificate, could place the deposit out of the reach of his attaching creditors. The purpose of a demand by a depositor upon the banker, is to give the latter an opportunity to pay and avoid a suit and the costs thereof. Garnishees are not liable for costs but for the amount in their hands belonging to the debtor in attachment, and the attaching creditor can make a demand that would be availing only by suing out the writ and causing it to be served on the garnishees, and from the time of service the money, then in their hands, belonging to the debtor in attachment, becomes subject to the legal claims of the attaching creditor against such debtor. In our judgment the first reason suggested why this court should reverse is not tenable.

The second reason for reversing is, "That the judgment as entered is informal and affords no protection to plaintiffs in error."

The judgment of the court below we have quoted literally, and it appears thereby judgment was rendered against C. D. Ham & Co. in favor of Richard A. Peery, for \$200, and judgment was also rendered against them in favor of John J. Manion for \$23.65 and costs. A judgment for a certain amount is rendered in favor of one person, and another judgment for a different and additional amount is also entered in

favor of another person, together aggregating \$223.65, and against garnishees having but \$200 in their hands belonging to the debtor in attachment. This judgment is informal and erroneous and must be reversed. Manion had no legal right to recover in his own name a judgment against plaintiffs in error. The proper and established practice in this State is to enter judgment against the garnishee in favor of the defendant in attachment for the benefit of the attachment creditor. Whatever surplus there may be after paying the creditor and costs, belongs to the debtor in attachment. *Stahl et al. v. Webster et al.*, 11 Ill. 511; *Webster et al. v. Steele et al.*, 75 Ill. 544. The judgment is reversed and the cause remanded, the costs in this court to be taxed against John J. Manion.

Reversed and remanded.

39 344
59 545

THE CITY OF VANDALIA

V.

PICKETT ROPP.

Municipal Corporation, Negligence of—Street Crossing—Personal Injuries—Contributory Negligence—Evidence—Instructions.

1. A municipal corporation is bound, with reference to all of its street crossings, to use reasonable care and diligence to keep the same in a reasonably safe condition for the use of the public.

2. Whether such care was exercised in a given case is a question of fact for the jury.

3. Likewise whether under given circumstances the plaintiff was guilty of contributory negligence.

4. Where a party while exercising due and ordinary care for his personal safety is injured by the negligent acts of another, there may be a recovery on account of such negligent acts, where both parties are equally in the position of right, which they hold independently of each other; the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care and diligence in endeavoring to avoid it.

5. Evidence on behalf of the plaintiff, going to show that repairs were made to whatever caused a given injury after the occurrence thereof, should be admitted in an action to recover therefor.

City of Vandalia v. Ropp.

6. In the case presented, this court holds that the defendant was guilty of negligence in not keeping in proper repair the crossing which caused the injury in question, and declines to interfere with the verdict for the plaintiff.

[Opinion filed February 2, 1891.]

IN ERROR to the Circuit Court of Fayette County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Defendant in error brought this suit against the city of Vandalia to recover damages for personal injuries caused by the negligence of the city. The declaration of three counts substantially charges that planks of a street crossing were permitted to be and remained loose, shaky and unfastened, and to be ten inches higher than the ground, and the approaches were allowed to be and remain unguarded; that while plaintiff was, with all due care and caution, driving a team and wagon upon and across said street and crossing, by reason of said bad and dangerous condition of said street and crossing, his wagon was tipped, and so suddenly jarred and shaken that the load on said wagon, upon which plaintiff was then riding, was tipped, turned and thrown from said wagon, by means whereof plaintiff was then and there thrown from the load and wagon and upon the ground, and one of his legs broken, and he was otherwise hurt and injured permanently, etc. To the declaration defendant pleaded "not guilty;" issue was joined upon that plea, a trial was had, the jury found defendant guilty and assessed plaintiff's damages at \$400. Defendant thereupon moved for a new trial, but the court overruled the motion and entered judgment on the verdict for plaintiff. Defendant sued out a writ of error and brings the record to this court for review.

The crossing in question was constructed of two-inch oak plank laid upon cross-ties. It was sixty to seventy feet long, about three feet wide on top, and extended east and west across Eighth street. A space of about twenty-six feet in the center was constructed and used for teams and vehicles. This crossing was at the intersection of Eighth and Main streets in said city, and was laid along on the north side of Main

across Eighth. Eighth street runs north and south and Main street east and west. The Vandalia railroad track is laid on the south side of Main street, parallel with said crossing, and about forty feet south of it. The natural surface of the ground immediately from said crossing, south and west, is a decline or down grade. On its north side the crossing along the space used for wagons was nearly level with the street, and on its south side was from six to ten inches above the surface. On this side, along the twenty-six feet of space, the cross-ties had been beveled off, and upon the beveled surface oak plank two inches thick and about eight inches wide had been nailed, forming an inclined approach to the top of the crossing. At the time of his injury plaintiff was employed as a teamster by a firm engaged in baling hay at a barn on Eighth street, about half a block north of the crossing.

He had put half of an ordinary load of bales upon his wagon in the barn, when he was directed by the person in charge there, to go on with it to the car and make room for a man coming to the barn with a load of loose hay. Plaintiff drove out of the barn and down the street toward the crossing, stopping a short distance north of it to arrange the load by putting two bales of the front tier back, and thus make it more safe and less liable to be tipped off in driving over the crossing. He then got on the wagon and drove at a slow walk down to and over the crossing, and the front wheel of the wagon dropped abruptly down from the south edge of the crossing to the ground, tipping off the part of the load upon which he was seated, and himself upon the ground, and breaking his right leg. By reason of his injury he was confined to the house about eight weeks, was unable to do any work for three months, contracted a bill for medical treatment of \$80, and the evidence tends to show such injury is likely to be permanent.

Messrs. JOHN A. BINGHAM and FARMER & BROWN, for plaintiff in error.

Messrs. HENRY & GUINN, for defendant in error.

GREEN, J. Under the facts proven in this case, it is insisted on behalf of plaintiff in error that the verdict is without support and the judgment ought to be reversed, first, "because the plaintiff knew and was thoroughly acquainted with the condition of the crossing for some time just prior to the accident, and knowingly and voluntarily placed himself in a condition to receive an injury;" second, "because at the time that the injury was received, he was not in the exercise of that degree of care and caution that it was his duty to have exercised under the circumstances;" third, "because the crossing was not in an unsafe or dangerous condition for use by any one in the exercise of ordinary care and caution." An inspection of the record satisfies us that the jury were fully warranted by the evidence in finding that the crossing was in a dangerous and defective condition at the time of plaintiff's injury. In the space over which wagons were hauled some of the top boards were unfastened at the ends, and were warped or cupped up in a way to probably cause a wagon to jar or tip in passing over. The approach plank on the south side, where the usual course of travel was, had been suffered to remain loose and unfastened to the cross-ties, and had been pushed out of its proper place, leaving an abrupt descent of six to eight inches from the top of the crossing to the ground at the time of the accident, and the approach to the crossing from the south had never been graded, although it was practicable to do so, and thus have probably prevented the accident. The crossing had remained in such an unsafe and defective condition for a length of time prior to the injury sufficient to enable the city officials, using ordinary diligence, to have discovered its condition and repair it, but it seems to have been a place entirely neglected. It is suggested, however, that this crossing was not much used, and hence the city should not be held to the exercise of the same degree of care and diligence to keep it in repair as in the case of a street crossing where the travel was greater. We understand the duty imposed upon the municipal corporation by the law with respect to all its street crossings, is to use reasonable care and diligence to keep such crossings in a reasonably safe condition for the use of the public. Whether defendant performed this

duty with respect to this crossing was a question to be determined by the jury in view of all the facts and circumstances proven. As before said, they were justified by the evidence in finding the city had failed to perform this legal duty, and was guilty of the negligence charged, and that plaintiff's injury resulted from that negligence.

The question of plaintiff's contributory negligence was also a question of fact for the jury to determine, and the evidence shows he stopped before going upon the crossing, arranged his load to make it more safe, and less liable to tip off, then drove at a slow walk to and upon the crossing, straight across, at the usual and best place to cross, a little east of the center of the twenty-six feet space mentioned. Ordinary care and caution on his part could be fairly inferred by the jury from these facts.

The contention that plaintiff knew the condition of the crossing for some time prior to the accident, and knowingly and voluntarily placed himself in a condition to receive an injury, remains to be considered. Plaintiff had seen the crossing and its condition several times before he was injured and had walked over it, but had not driven over it until the day before he was hurt; had hauled five or six loads of baled hay from the barn over the crossing on that day. He knew the approach board was off at the time he was hurt, and these facts are relied on to establish the inference that he knowingly and voluntarily placed himself in a condition to receive an injury. But on the other hand he was doing his lawful work of hauling over a street and crossing opened and in use for such purpose. It was the only route he could use to transport his load to the car; he had hauled loads over the same place without accident the day before; he was in the exercise of due care and caution, so far as fixing his load and driving were concerned, and although his knowledge of the condition of the crossing was a circumstance proper for the consideration of the jury, and was doubtless considered by them, yet it must be taken in connection with all the other facts and circumstances in evidence in order to properly determine the question whether he was guilty of such negligence as would bar his recovery, notwith-

City of Vandalia v. Ropp.

standing defendant's failure to perform its legal duty as charged. The degree of care which the law required the plaintiff to exercise was ordinary care under all circumstances of the case. The plaintiff's knowledge as to the condition of the crossing would be one of the circumstances to be considered by the jury in determining the question whether there had been the exercise of ordinary care. *Bloomington v. Chamberlain*, 104 Ill. 268; *City of Aurora v. Hillman*, 90 Ill. 61.

In the case of *Calumet Iron and Steel Co. v. Martin*, 115 Ill. 358, many authorities are cited and the questions here presented are fully discussed. It is there said, the necessary implication from the rulings in these cases obviously is, that where a party, while observing due or ordinary care for his personal safety, is injured by the negligent acts of another, there may be a recovery on account of such negligent acts when both parties are equally in the position of right, which they hold independently of each other; the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care or diligence in endeavoring to avoid it. What particular facts amounted to an exercise of ordinary care, or what particular facts amounted to a want of ordinary care, it was for the jury to determine. *City of Chicago v. McLean*, 133 Ill. 148. Applying the rules thus announced and after examining all the evidence, we are satisfied it warranted the verdict rendered. The admission of testimony on behalf of the plaintiff concerning repairs at the crossing after the accident, under the decision of our Supreme Court was not error. We do not think the first, seventh and ninth instructions given for plaintiff were erroneous or calculated to mislead the jury. The instruction asked for on behalf of defendant and refused is not a correct statement of the law. In substance it amounts to this, that the defendant could not be held to the exercise of the same degree of care and diligence (that is, reasonable care and diligence,) in keeping this crossing in a reasonably safe condition as in the case of a crossing more used. We have expressed our views on this proposition, and hold that the court properly refused the instruction. The judgment is affirmed.

Judgment affirmed.

J. F. MILLER

v.

W. F. ROLEN.

Exemptions—Schedule—Failure to Deliver within Proper Time—Replevin.

Where a debtor makes out, signs and swears to a schedule of his property, and leaves the same at a place agreed upon, for the officer, it amounts to a delivery where the understanding is that the officer shall call there for it.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of Richland County; the Hon. CARROLL C. BOGGS, Judge, presiding.

Messrs. ALLEN & FRITCHEY, for appellant.

Mr. J. S. MONTRAY, for appellee.

GREEN, J. Appellee, defendant in execution, brought replevin for a piano against appellant, who, as constable, levied upon it by virtue of the writ. The cause was tried by the court and a finding and judgment in favor of plaintiff resulted. The only point presented on behalf of appellant necessary to notice is the claim that appellee, when notified of the execution, did not *deliver* to the officer the schedule required by the statute. It is not denied, appellee had no more property, including the piano, than was exempt from execution, nor that he made a schedule in proper form, of all his personal property, subscribed and sworn to by him, as provided by law; but it is said this schedule was not *delivered*. Plaintiff testified he told appellant when he read the execution to him, that he was ready to schedule and would go right over to the squire's office and do so and requested appellant to come. The latter said he did not have time. Plaintiff then said he would go over, make the schedule, and leave it with the squire for appellant, who replied, all right, he would afterward

T., St. L. & K. C. R. R. Co. v. Conroy.

go and get it. Plaintiff at once went over to said office, there made out, subscribed and swore to the schedule and left it with the squire, for appellant, as had been agreed. Plaintiff was corroborated to some extent by the witness Phillips, and contradicted by appellant. We think the court below was fully justified in finding as it did for plaintiff. There was a substantial delivery of the schedule to the officer. It was left for him at the place appointed and where he agreed to go and get it. By his assent to the arrangement made for delivery, he induced plaintiff to act with the honest belief that such delivery would be accepted, and can not now be permitted to repudiate his agreement. It is aptly said in *Langston v. Murphy*, 31 Ill. App. 188, "It is the duty of a constable, in seeking to enforce an execution, to act fairly and in good faith, and not use the provisions of the exemption law as a trap to catch the debtors who are honestly and in good faith seeking to avail themselves of its benefits."

No reason is perceived for reversing the judgment and it is affirmed.

Judgment affirmed.

TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COM-
PANY
V.
JOHN CONROY.

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39	351
83	531
39	351
184	481
39	351
104	1 59
104	60
e104	1 61

Master and Servant—Negligence of Master—Personal Injuries—Damages—Release and Satisfaction—Fraud—Independent Contractor.

1. In work done under the charter powers of a railroad company by a contractor, he exercising the power given said company by its charter, such contractor is a servant of the company so far as the public is concerned, and it has the right to hold the company responsible for his acts, he being in reality the company that is acting.

2. This court declines, in view of the evidence, to interfere with the judgment for the plaintiff in an action brought by a servant to recover for personal injuries suffered through the alleged negligence of his employer.

[Opinion filed February 2, 1891.]

APPEAL from the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

On the 6th day of January, 1889, appellee was working upon the road bed of appellant in and near the City of East St. Louis. Under orders from his foreman he with a number of others got upon a hand-car to go out on the road to a place where the track was being changed from a narrow to the standard gauge, to assist in this work, and on the way out the hand-car left the track and tipped over and fell upon appellee and broke his leg. It was claimed that the hand-car was in bad repair and particularly that the axles were bent so that the car was liable to leave the track. In addition to the general issue, defendant pleaded a release, and accord and satisfaction. Replications were filed to the second and third pleas, setting up that the settlement was procured by fraud and that the consideration for the same had not been paid. The defendant claimed that plaintiff was not in its employ, but in the employ of one Kneeland, who, under a contract with the company, was engaged in changing the gauge of the track from the narrow to the standard gauge.

Messrs. CLARENCE BROWN, H. A. NEAL and E. C. RHODES, for appellant.

Messrs. ALEX. FLANNAGEN and JESSE M. FREELS, for appellee.

REEVES, J. The first question raised upon this record is that appellee was the servant and employe of one S. H. Kneeland, who, under a contract with appellant, was reconstructing the track of the railroad company by changing the gauge from the narrow to the standard gauge, and that Kneeland was operating the hand-car which caused the injury to appellee and therefore that Kneeland alone was responsible to appellee for his injury, if any one was liable, and in no event was appellant liable.

Even if we concede that appellee was working for Kneeland, the contractor, we do not see, under the other facts shown,

how that can make any difference as to appellant's liability. It must be conceded, we think, that the work Kneeland was doing was work done in pursuance of the charter powers of appellant to construct a railroad. Appellant had no power directly, through its own immediate agents or by contractors, to construct or reconstruct a railroad on lands acquired for its right of way, except the power derived from its charter. It was engaged in the work of reconstructing its track, through a contractor, and he, in the performance of his contract, was exercising the power given to appellant by its charter. Under these conditions the contractor was the servant of the company, so far as the public were concerned, and the public has the right to hold the company responsible for his acts, because it is really the company that is acting. *West v. St. Louis, Vandalia & Terre Haute Railroad Company*, 63 Ill. 545; *Balsley v. St. Louis, Alton & Terre Haute R. R. Co.*, 119 Ill. 68.

It, however, appears from the preponderance of the testimony, that the hand-car that caused the injury belonged to the railroad company. There is testimony tending to show that appellee was in the direct employ of the company, and there can be no doubt that he believed he was working for the company and was paid by the company. He was in fact paid from the pay car of the company and by the man who was the paymaster of the company. But as we have seen, it can make no difference under the facts whether he was in the direct employ of the company, or in the employ of Kneeland, the contractor. He was, in either case, the servant of the company, and the company is responsible for his injury. It is further objected that the proof does not show that the axle of the hand-car was bent or sprung. One witness testified that it was, one that he did not know that it was, one that in his opinion it was not, and two others that the motion of the car when running was "zig-zag." This testimony would seem fairly to support the finding of the jury that the axle was sprung or bent. We find no sufficient reason for disturbing the finding of the jury as to the alleged release by appellee of his cause of action. No other questions are raised in the case. The judgment of the City Court is affirmed. *Judgment affirmed.*

THE ST. LOUIS & CAIRO RAILROAD COMPANY

V.

THE EAST ST. LOUIS & CARONDELET RAILROAD COMPANY.

Landlord and Tenant—Lease of Track—Railroads—Rental—Recovery of.

1. Franchises as well as lands and tenements may be demised. A railroad company may lease its franchises and property by authority of the Legislature.

2. A receiver can not, under a contract between his insolvent and another, enter upon and use the property of the latter and without his consent repudiate or change the terms thereof.

3. The assignee of the lessee of a railroad track, using the same under the conditions of a lease duly entered into, is bound to pay the rent according to the terms thereof.

4. This court declines, in view of the evidence, to interfere with the judgment in behalf of the plaintiff in an action brought to recover a balance alleged to be due for the rental and use of its track and right of way by defendant company.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of St. Clair County; the Hon. GEORGE W. WALL, Judge, presiding.

This was a suit in assumpsit brought by appellee against appellant to recover a balance alleged to be due for the rental and use of appellant's track and right of way from December 12, 1881, to the 31st day of August, 1883, inclusive, at the rate of \$25 per day, *ad damnum* \$12,000. The cause was tried by the court by consent of the parties, and no written propositions were presented by either party to the court, to be held as the law in the decision of the case. The court found the issues for the plaintiff and assessed its damages at \$11,004.34. Defendant's motion for a new trial was overruled. Judgment was entered for plaintiff on the finding of the court and defendant took this appeal.

The contract relied upon by plaintiff below to sustain its right of recovery under the facts proven, is as follows:

39	354
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39	354
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39	354
150	484

The East St. Louis & Carondelet Railway will permit the Cairo & St. Louis Railroad Company to run trains upon their road from the junction near and below Cahokia to the railroad of the Illinois & St. Louis Railroad Coal Company, near East St. Louis, from and after the first day of May, A. D. 1873, for five years next ensuing, upon the following conditions, viz. :

1. The Cairo & St. Louis Railroad Company shall furnish materials necessary for a third rail between the rails of the main track of the East St. Louis & Carondelet Railway, including rails, frogs, switches, fastenings, etc., and to repay the cost of laying the same, to be done by and under the direction of the East St. Louis & Carondelet Railway.

2. The Cairo & St. Louis Railroad Company shall pay for each loaded car run over said road, or to intermediate points on the line, fifty cents, provided there are no more than fifty cars so run per day; all cars over the number of fifty per day and not exceeding seventy-five in the aggregate, shall be paid for with forty cents per car; all cars over seventy-five and not exceeding one hundred in the aggregate shall be paid for with thirty cents per car, and all cars over one hundred per day shall be paid at the rate of twenty-five cents per car, payments to be made monthly, on the 10th day of each month, for the month expiring on the last day of the next preceding month, at the office of the East St. Louis & Carondelet Railway, at East St. Louis, Illinois.

Provided that from and after the 1st day of July next, the said Cairo & St. Louis Railroad Company shall pay for the privilege granted them by this agreement not less than \$25 per day, whether the sum due under the above enumerated rate of charges amounts to that sum or not.

3. The roadbed and track to be kept in repair by the East St. Louis & Carondelet Railway at their expense, excepting only the cost of renewals required on the line of third rail, and frogs and switches necessary, and maintained for the use of said Cairo & St. Louis Railroad.

4. The time table for the passenger trains for the Cairo & St. Louis Railroad shall be established by mutual agreement

Vol. 39.] St. L. & C. R. R. Co. v. E. St. L. & C. R. R. Co.

between the proper representatives of the parties hereto, so as to answer the purpose of said Cairo & St. Louis Railroad Company as near as may be without manifest injury and detriment to the interests of the East St. Louis & Carondelet Railway.

5. The time for the running of freight trains by the Cairo & St. Louis Railroad Company shall be fixed by the East St. Louis & Carondelet Railway Company, so as to permit as many as six trains each way daily; provided that every freight train run on such time table shall, from and after the first day of June next, be counted as made up of not less than thirty cars, unless there be less than thirty cars to run a day.

6. Either party, by their president or general manager, shall have the right to terminate this agreement upon ninety days written notice, from and after July 1, 1873, in which case the materials furnished by the Cairo & St. Louis Railroad Company shall be returned to them in as good condition as received, natural wear and decay excepted.

7. Cars passing loaded one way shall be passed on their return free of charge, if returned within ten days; empty cars, if returned loaded within ten days, shall only be charged for one time; otherwise empty cars shall be charged for same as loaded cars.

8. Any disagreement arising between the parties hereto, from and under the terms hereof, shall be referred to and decided by arbitrators, one to be chosen by each party, and a third one by the two thus chosen; a decision of a majority of them, in writing, shall be final.

Dated and executed in duplicate this 30th day of April, 1873. Signatures and seals of both parties.

Before this contract was executed, the said second party thereto had executed its trust deed, conveying to the Union Trust Company, of New York, its railroad rollingstock, property, rights and franchises, and all property, rights and franchises thereafter by it acquired, to secure \$2,500,000 of its bonds, and default having been made in the payment of interest thereon, suit against it was instituted by the Union Trust Company in the Federal Circuit Court for the South-

ern District of Illinois. By the decree of said court H. W. Smithers was appointed receiver of all property of said Cairo & St. Louis Railroad Company, and on December 6, 1877, as such receiver, he took possession and control of all the railroad property of that company, and entered upon and used the track described in said contract from that date until February 1, 1882. By the decree of said Circuit Court of the United States, said deed of trust was foreclosed, and in pursuance of the decree the master in chancery of said court, on December 22, 1881, conveyed to trustees all the property covered by the deed of trust, and on January 31, 1882, said trustees conveyed said property to appellant.

On January 30, 1882, Smithers conveyed to appellant all his interest in any and all property he had acquired as receiver, and on February 1, 1882, appellant was put into and took possession of said railroad property, including the track mentioned in said contract, from said receiver, and continued to use and occupy the said track and the single rail mentioned and provided for in said contract until August 31, 1883, and paid as rent therefor to appellee divers sums of money at successive periods during said time, which were received *on account of rent*.

It further appears by the testimony of Mr. Coulogne, who was the president of appellee's company at the time Smithers was appointed receiver, and continued as such president until 1880 or 1881, and who executed said contract on its behalf, that the sum fixed by that contract to be paid for the use of said track by appellee was not reduced; that applications were made to him for a reduction or a new contract, which he did not consent to, but declined to make any reduction or new contract, until the arrearages under the original contract were paid; that he made no contract with Smithers in reference to the rental to be paid under said contract; that he had conversation at different times with some of the officials in regard to a reduction of said track rent; the only arrangement to the best of his recollection was that they would continue under the old contract by paying monthly, on account, a certain sum of \$333.33½ per month; that whenever application was made

to him for reduction, he invariably told them, "We shall hold to the old contract until that is settled up."

Smithers testified he had several interviews with Coulogue touching the reduction of track rent; that he distinctly refused, from the very beginning of his conversations with Coulogue, to recognize any liability as receiver for any *back rent* due by the railroad company except so far as the court might order him to pay, and refused to recognize the existence of the old contract for the use of the track as in any way binding on him as receiver, and refused to pay any such *rental* as the old company had agreed to pay for the use of the track; that no agreement was reached as to the amount of rental which should be paid for the use of appellee's road; that he never authorized the payment of more than \$4,000 per annum for the use of said track, and authorized that amount to be paid in monthly installments, and that it was open to Mr. Coulogue at any time after Smithers was appointed receiver, to refuse to allow the latter's trains the right to run over this road; that he did not agree to extend or carry out any written contract made between appellee and the Cairo & St. Louis Railroad Company.

Thomas, who was appellee's cashier from May 1, 1882, to December 1, 1886, and had charge of its books, testified an account was kept of this track rent on said books, charging appellant with each month's rent at \$25 per day, and impressions of monthly statements appearing in the letter book of appellee were put in evidence in the handwriting of Thomas for track rent for each of the months of June, July and September, 1882. The statement for the rent will serve to show the character of each, and is as follows:

"July 1st, 1882.

St. Louis & Cairo Railroad Co.,

TO EAST ST. LOUIS & CARONDELET RAILWAY, DR.:

July 1. To rent of track for the month of June, 1882, 30 days, at \$25 per day, \$750."

Thomas testified that, to the best of his knowledge, these accounts were transmitted to defendant, or some of its officials, at the time the impressions were taken, during the first days

St. L. & C. R. R. Co. v. E. St. L. & C. R. R. Co.

of the month for the month preceding; and on cross-examination testified he was not positive these monthly bills were made or presented every month; that he was positive he presented the bill for the month of May in June, 1882, but did not recollect positively of having presented any others; that he presented the bills to appellee's cashier, who refused to pay the bill, and witness received \$323 on account; that when he went to collect at appellee's office, they would first present to him, for his signature, a voucher, as follows:

"St. Louis & Cairo Railroad Company,

TO E. ST. LOUIS & CARONDELET RY. OF EAST ST. LOUIS, DR.
1882.

Dec. For rent of track between E. St. Louis
and South Junction for the month
ending Dec. 31, 1882..... \$ 333.31

I hereby certify that I have verified all the computations herein and find them correct.

Examined, found correct and entered. Audit. No. 977.

Approved: LOUIS ENOS, Auditor.

C. HAMILTON, General Superintendent.

Received this day of , 188 , from St. Louis & Cairo Railroad Company, the sum of three hundred and thirty-three 31-100 dollars (\$333.31), in full of the above account."

This style of voucher he would refuse to sign and they would then present the following receipt which he would fill out and sign:

"Received of St. Louis & Cairo Railroad, three hundred and thirty-three dollars on account of rent for month of 1882.
GEO. K. THOMAS, Cashier."

Chas. Hamilton testified he was in charge of appellant's railroad for Receiver Smithers, prior to February 1, 1882, when he took charge of it for appellant; that \$4,000 per year was paid monthly, and continued to be paid, after appellant took charge and until that company surrendered it August 31, 1883; that Mr. Thomas has the acknowledgment of the only claim for rent, at the rate of \$25 per day, ever made on

VOL. 39.] St. L. & C. R. R. Co. v. E. St. L. & C. R. R. Co.

him; that was dated March 2, 1886; up to that time did not know that the claim would be for \$25 per day; was never presented with monthly bill for that rent at that rate, nor for any amount; the company never made any agreement in relation to any former contract to pay \$25 per day; the business was done after appellant took possession, precisely the same as it was done under the receivership; they paid them \$333.33 a month in the same manner. The following correspondence was also used in evidence on behalf of appellee.

“ST. LOUIS, May 30, 1883.

ST. LOUIS & CAIRO RAILROAD Co.

Chas. Hamilton, General Superintendent.

COL. J. HILL, Gen'l Supt., E. St. L. & C. Ry,

St. Louis, Mo.

Dear Sir:—Having about completed our own track from East St. Louis to South Junction, we will not require the use of your road after the 31st of this month. As our embankment is quite new, will you kindly permit our connection to remain untouched a few days, until I am quite safe from extreme high water, should we have it.

Yours very truly,

C. HAMILTON, Gen'l Supt.”

“EAST ST. LOUIS & CARONDELET RAILWAY.

Joseph Hill, General Superintendent.

GENERAL SUPERINTENDENT'S OFFICE, ST. LOUIS, MO.,

June 1, 1883.

CHAS. HAMILTON, Esq.,

Gen'l Supt., St. Louis & Cairo R. R. Co.

Dear Sir:—I have your letter of May 30, 1883, advising me that you will not require the use of this road after May 31, 1883. My understanding of the agreement under which your company has used this road is, that it requires ninety days notice to terminate it, and I shall so construe your notice.

Yours truly,

J. HILL, Gen'l Supt.”

St. L. & C. R. R. Co. v. E. St. L. & C. R. R. Co.

“ST. LOUIS & CAIRO RAILROAD COMPANY.

General Superintendent's Office.

Chas. Hamilton, General Superintendent.

St. Louis, August 29, 1883.

COL. J. HILL, Gen'l Supt., East St. Louis & Carondelet
Railway, St. Louis, Mo.

Dear Sir:—As we have at last gotten onto our own track between East St. Louis and South Junction and have no longer use for your road between those two points, and the ninety days notice, which you claim as due you, expires on Friday next, I would like to take up our rail as soon as possible and get it out of your way. If I take the rails up and put them in piles of a carload in a place, what would you charge me for hauling them down to South Junction.

Very truly,

C. HAMILTON, Gen'l Supt.”

Appellee also read in evidence an impression copy of statement, dated April 30, 1882, for the rent of track from December 1, 1877, to April 30, 1882, charging track rent at twenty-five dollars per day, and crediting payments received. The evidence did not show this statement to have been transmitted to and received by appellant's officers, or any of them.

MESSRS. POLLARD & WERNER, for appellant.

MR. A. S. WILDER, for appellee.

GREEN, J. We have included in the foregoing statement so much of the evidence as we deem material in the consideration of this case.

It is contended by appellant that the contract of April 3, 1873, between appellee and the Cairo & St. Louis Railroad Company, was not a lease; that it expired by its terms on the last day of April, 1878, when the road was operated by the receiver, who positively repudiated its terms and refused to pay the contract price for the use of the track; that when defendant came into possession of the railroad it continued to use plaintiff's track as the receiver had been doing, without any agreement, and without anything being said in relation to

the use of this track or the compensation therefor, and there is nothing to show the defendant knew there was or had been any written contract. Hence this suit can not be maintained, because it is brought upon an alleged agreement of defendant to pay \$25 per day for the use of plaintiff's track, and no such promise can be implied from the facts and circumstances proven.

To us it seems the contract possesses all the essential qualities of a lease, and was intended to be such by the parties executing it. The Cairo & St. Louis Railroad Company's road was a narrow gauge road, the northern terminus of which was East St. Louis. At the date of the contract its road extended north only to the junction below Cahokia, and from that point to reach East St. Louis and carry freight and passengers over the line to its northern terminus, it became necessary to run its trains over the track of appellee, and also to have the use of a rail to be placed and maintained between the rails of appellee's track and thus furnish a narrow gauge. To meet this necessity this contract was made. By its provision the lessee was given the right to use the track of appellee and the single rail furnished by the lessee (evidently intended for its exclusive use), for the term of five years at a stipulated minimum compensation of \$25 per day, to be paid appellee monthly after July 1, 1873. The use of the track contemplated by both parties was for the purpose of enabling appellant to carry passengers and freight for hire on its trains running upon the narrow gauge track constructed by putting in said single rail on appellee's right of way. To exercise the right to carry on such traffic, the use of appellee's franchise was necessarily given, because without this, appellant could not lawfully so carry on its business as a common carrier over appellee's road. *City of Chicago v. Evans*, 24 Ill. 52.

It thus appears by the record that the use of appellee's right of way and the exclusive use of the single rail attached to the soil was given by the contract, and this was a use of realty in legal contemplation, and the use of appellee's franchise was also intended to be and was included, which was a

use that could lawfully be demised. The general rule is, that not only lands and tenements, but franchises, can be demised. A railway company may lease its franchise and property by authority of the Legislature. Taylor's Landlord and Tenant, 8th Ed., Sec. 17.

In *Rohn et al. v. Harris et al.*, 130 Ill. 525, which was a proceeding for partition, it was held that a ferry franchise, while strictly speaking not real estate, partook so far of the nature thereof that it might be partitioned in the same manner as real property, citing 3 Kent, 458, 459, and *Dundy v. Chambers*, 23 Ill. 369, in which case the court held a ferry franchise could only be transferred in accordance with the provisions of the statute of conveyances. We perceive no difference between the franchise whereby the right is given a ferry company to exact and collect toll for the transportation of passengers and property over water, and the franchise whereby the right is given to a railroad company to exact and collect compensation for the transportation of passengers and property over the land, so far as the matter of conveyance or leasing is concerned.

The record discloses that the lessee company entered and held under this lease until December 6, 1877, when the receiver took charge of and operated its road over and upon this narrow gauge track while the lease was still in force and before the expiration of the five years, and continued such use and operation after such term expired until he turned over the possession of all the lessee's property, including the track, mentioned in the lease on February 1, 1882, to appellant, and paid as rent \$333.33 each month, which the lessor received and receipted for only on account and not in full, refusing at all times to reduce the rent, or make a new contract. Smithers knew all this, and if he did not wish to pay the full amount of rent reserved he should have quit the use. He could not as receiver enter under this contract and continue to use and occupy the premises as he did, and without the consent of the lessor either repudiate or change the terms of the contract. *Higgins v. Halligan*, 46 Ill. 173; *Griffin v. Knisely*, 75 Ill. 411.

On February 1, 1882, appellant, as grantee in the deeds of the trustees and receiver, entered into possession of, and from that time continued to use and occupy and run its trains over the same track, and pay rent therefor in the same manner the receiver did; accepting without objection receipts on account and not in full, until it terminated the contract, August 31, 1883, by giving the notice therein provided for. The evidence shows, as we understand it, that the relation of landlord and tenant between appellee and appellant existed, and aside from its legal liability as assignee of a lessee, holding over, to pay the rent reserved by the terms of the lease, the proof also shows that in fact appellant used the track, right of way, and franchise of appellee under and by virtue of the contract, and it was bound to pay the rent according to the terms thereof. The lease was executed in duplicate, one being retained by each party. Smithers evidently found the one kept by the lessee, because he refers to it in his testimony as the old contract. Hamilton (appellant's superintendent) says he had charge of the lessee's property for the receiver, and most probably had seen it. He testified he knew about the payment of rent during the receivership. He paid it. The monthly sums paid were the same in amount and paid in the same manner during the time appellant continued in possession. Thomas, appellee's cashier, testified that monthly statements, charging appellant with rent at the rate of \$25 per day, were transmitted to it or its officials, and that he in person presented such a statement for the rent of May, 1882, to appellant's cashier in June of that year. That when he went to collect the rent monthly, at the appellant's office, he would be first presented with the voucher for a month's rent at the rate of \$333.33 per month, with a receipt for that sum in payment attached, which he would refuse to sign, but would sign and deliver a receipt for that amount *on account*, which was accepted. The superintendent says he *made out* this form of voucher and that appellee's officer would attach the receipt for \$333.33. He knew then the voucher and receipt in full, prepared by him, was not signed by appellee's officer, and the receipt which was so signed and given was itself a notice to

him that a larger sum was claimed for the month's rent by appellee, and that the sum of \$25 per day was charged in the monthly statements transmitted to appellant's officials, which he says were not *presented to him*; but the cashier, to whom one at least was presented, as Thomas says, was not introduced to deny having received the same. But, in addition to all this, the official correspondence between Hamilton, superintendent for appellant, and Hill, superintendent for appellee, conclusively shows that both understood appellant had been and was using and occupying the demised premises under and by virtue of this lease, and not otherwise.

On May 30, 1883, Hamilton, by his letter of that date, advises Hill that appellant would not require the use of appellee's road after May 31st. On June 1, 1883, Hill replies to this: "I have your letter of May 30, 1883, advising me you will not require the use of this road after May 31, 1883. My understanding of *the agreement under which your company has used this road*, is, that it requires ninety days notice to terminate it, and I shall so construe your notice." Hamilton's understanding is the same, evidently. He does not reply as he would have done if he understood the old contract, reserving a minimum rent of \$25 per day, was not binding on appellant, but continues to use and occupy the demised premises for it, without further correspondence, until August 29, 1883, when he writes to Hill, informing him appellant had at last gotten on its own track between East St Louis and South Junction, and had no longer use for appellee's road between those points; that the ninety days claimed by Hill would expire the next Friday, and he desired to take up *the rail of appellant* as soon as possible. The right to take up this rail is given only by the lease, and the notice required to terminate the contract is one of the provisions thereof. The remarks made concerning the refusal of Smithers to pay the full rent demanded will apply to the like refusal of appellant. Having availed itself of all the rights and benefits it acquired by the lease, under the facts proven it is liable for the rent. The damages assessed were not excessive. Appellant used and occupied the demised premises for a period of 577 days,

and paid \$6,333.65. The court properly found appellant liable to pay the minimum rental of \$25 per day, amounting to \$14,425. Deducting payments made, a balance of \$8,091.35 remained unpaid on September 10, 1883, and interest added at six per cent on such balance from that date to September 17, 1889, the date of trial, which was properly allowed, makes a sum greater than \$11,004.64, the amount of judgment.

We think the judgment was warranted by the evidence, and it is affirmed.

Judgment affirmed.

39	363
138	465

THE ST. LOUIS BRIDGE COMPANY

V.

EMORY MILLER.

Personal Injuries—Bridge Company—Negligence of—Failure to Provide Guard Rail—Proximate Cause—Examination by Physicians—Contributory Negligence—Evidence—Instructions.

1. Where the evidence in a given case is conflicting, it is for the jury to give the weight and credit to that introduced by each party, which they believe it is entitled to.

2. In an action brought to recover from a bridge company for personal injuries alleged to have occurred through its negligence, this court holds that the evidence justified the jury in finding that the plaintiff was seriously and permanently injured by frightened mules running against her and pressing her against the outer railing of its bridge; that she was in the exercise of reasonable care for her own safety when injured; that the negligence of the defendant in failing to provide reasonably safe and secure barriers to prevent live stock from crossing into the foot-way, or in the absence of such barriers, failing to establish and enforce rules for securing and controlling live stock while being driven across the bridge, occasioned the injury to plaintiff; that the trial court properly denied a motion on behalf of the defendant that plaintiff be required to submit to a bodily examination by physicians; that the point advanced by the defendant that its negligence was not the proximate cause of the injury is not tenable; and declines to interfere with the judgment in her behalf.

[Opinion filed February 2, 1891.]

St. Louis Bridge Co. v. Miller.

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Messrs. G. & G. A. KOERNER, for appellant.

In overruling the motion to have the plaintiff examined by physicians appointed by the court, there was surely error.

The injuries claimed to have been sustained by the plaintiff are not of a character to be apparent; there was no loss of limb or disfigurement, which could be perceived.

The plaintiff claims a positive injury to the spine, resulting in nervous disorders and weakness of eye-sight. Admitting, for argument's sake, the right to recover, the question of the existence of these disorders and their extent, if they exist at all, becomes a most prominent question in the case.

Is it consistent with justice that these questions should be left altogether to the testimony of the plaintiff and those whom she chooses to bring forward as witnesses, or is the defendant and is the court entitled to the light which an impartial and scientific examination of the person of the plaintiff could throw upon this inquiry?

It is shown by the bill of exceptions that the defendant proposed to have an examination of the person of the plaintiff made by persons skilled in medical science, and the plaintiff refused to allow such examination. Defendant then moved the court for a rule upon the plaintiff to submit her person to such an examination for the purpose of having the testimony of the experts on the trial as to the extent or the permanency of the injury she claims to have received.

The court denied the motion and we assign this refusal for error.

On the trial the plaintiff, when on the witness-stand, was asked whether she was now willing to submit to an examination by surgeons to be appointed by the court; she again refused.

The court as well as the parties are entitled to the best evidence obtainable. And if it is in the power of one of the parties to furnish evidence and he refuses to do so, that fact is taken against him and he will be compelled to furnish such

evidence. 1 Greenleaf on Ev., Sec. 37 and 82; City of Frankfort v. Isbell, 93 Ill. 382; 2 Bishop on Marriage and Divorce, Sec. 590, and notes; R. R. Co. v. Hinlayson, 18 A. & E. R. R. Cases, 68; R. R. Co. v. Holland, 122 Ill. 467; Walsh v. Sayre, 52 How. 334; R. R. Co. v. Thul, 10 A. & E. R. R. Cases, 783.

The power of the court to order such examination is admitted in all of these cases. But the best considered case and one adopted as authority in many of the cases above cited, is the case of Schroeder v. R. R. Co., 47 Ia. 375. We quote from it:

“Whoever is a party to an action in a court * * * has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor then, to demand the whole truth, is unquestioned; it is the correlation of the right to exact justice. It is true, indeed, that on account of the imperfection incident to human nature perfect truth may not always be obtained, and it is well understood that exact justice, because of the inability of courts to obtain truth in entire falsehoods, can not be always administered. We are often compelled to accept approximate justice as the best that the courts can do in the administration of the law. But, while the law is satisfied with approximate justice when exact justice can not be obtained, the court should recognize no rules which stop at the first when the second is in reach.” * * *

“To our minds the proposition is plain, that a proper examination by learned and skillful physicians would have opened a road by which the court could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his control testimony which would have revealed the truth more clearly than any other that could have been introduced. The course of truth, the right administration of the law, demand that he should have produced it.”

The court in that case in its opinion fully discuss the objections against such a proceeding urged by the plaintiff and con-

clude by holding that in cases of this character it is not only proper but it is the duty of the court to order an examination, when requested by the defense, for the purpose of ascertaining the nature, character, extent and permanency of the injury complained of.

The court below refused the motion on the authority of *Parker v. Enslow*, 102 Ill. 272.

It will be observed, on examination of that case, that the court would not have been justified in ordering a physical examination. It was an action *ex contractu*, and the question was as to whether the note sued on was given for a good consideration.

The note had been given in settlement of a claim for damages for a personal injury, and whether the injury was a severe one or not, permanent or not, did not arise.

The law which controlled that decision was that if the parties in good faith compromised what was supposed by the plaintiff a good cause of action, plaintiff could recover on the note given in settlement.

The court, therefore, evidently paid but little attention to the question of physical examination. It dismissed the subject with these words: "Complaint is also made that the court refused to compel appellee to submit his eyes to the examination of a physician in the presence of the jury. There was no error in this. The court had no power to make or enforce such an order."

As to the power of the court to enforce such an order and the manner of enforcing it, we refer again to the case of *Schroeder v. Railroad Co.*, above cited.

The power of making the order is upheld by the court in cases prior and subsequent to case in 102. *Frankfort v. Isbell*, 93 Ill. 382; *R. R. Co. v. Holland*, 122 Ill. 467.

Are we not, in the light of these decisions, justified in calling the reference to this question an *obiter dictum* not called for by the question controlling that case and made without examination of the authorities?

Messrs. BAKER & CANBY, for appellee.

It is assigned for error, the court below refused to order appellee to submit her person to a medical examination by physicians appointed by the court. This the court had no power to do. The authorities are not in harmony on this point. In some States it is held the trial court may do this, and in others not. Our Supreme Court has denied the power. *Parker v. Enslow*, 102 Ill. 272.

There is no pretense in the affidavit, made in support of this motion, that plaintiff was feigning an injury she had not received, and there is nothing in the evidence or circumstances to justify it.

See on this point, *City of Galesburg v. Benedict*, 22 Ill. App. 114.

In *R. R. Co. v. Holland*, 122 Ill., the point was not decided, as the physicians named in the motion had been allowed to make an examination of plaintiff before the trial, and the error, if any, in overruling the motion, was held to be a harmless one.

All that is decided in 93 Ill. is, that it was the duty of the court to permit the refusal of plaintiff to submit to an examination to be shown to the jury, so that they might give it such weight as its importance deserved, and this was allowed in this case. An examination made at the time of the trial would not have disclosed any external evidence of the injury. It is an injury to the spine, internal in its character, and affecting the nervous system in various ways, such as incontinence of urine, impairment of the organs of vision, and other nervous disorders attendant upon a spinal injury, of which we complain in this case. It would have been quite easy, no doubt, for appellant to have got a committee of physicians and surgeons, like Dr. Kohl, in the employ of railroad corporations, to make an examination of appellee, and then testify there was in their opinion nothing the matter with her. The physicians who waited upon her immediately after and since the injury and who have had an opportunity from time to time to observe the effects produced upon her system thereby, are better qualified to speak upon this subject than others who might be appointed to make a hasty and necessarily imperfect examination. If the injuries complained of

were external in their character, such as a bruise or wound, the nature and extent of which could be readily discovered by an examination, there would be some reason for asking that one be made; but where the injury is internal and hidden, there is certainly no ground for making such an examination, as it would not reveal the injury complained of. It can only be known by observing its effects and consequences upon the system from time to time as they develop.

GREEN, J. Appellee brought this suit against appellant to recover damages for personal injuries received by her on the approach of appellant's bridge. The negligence charged in plaintiff's declaration is, in substance, the failure to provide a guard rail, balustrade or other barrier between the footway used by pedestrians crossing upon the bridge and the roadway provided and used for the passage of teams, wagons and live stock over the bridge; and in the third count it is averred that by reason of the absence of such guards, rails or bannisters it became and was the duty of defendant, in the exercise of ordinary care, to make and enforce such rules and regulations for the passage of animals and live stock across said bridge as would reasonably protect and secure persons crossing the bridge on foot from injury from such animals and live stock while being driven across the bridge; charges neglect of this duty, and it is averred in each count that by reason of the negligence of the defendant as charged therein, a drove of loose mules, permitted by defendant to be driven across said bridge, ran against and upon plaintiff, and pressed and squeezed her so violently against the north railing of the approach as to greatly bruise and injure her, and thereby her nervous system was greatly shocked and permanently injured and her spine permanently injured, her right eye hurt, etc. The trial resulted in a verdict for the plaintiff for \$1,800 damages, and defendant appealed. The first point suggested on behalf of appellant is, that the verdict is against the evidence. It is not denied that appellee paid her fare for crossing said bridge from St. Louis to East St. Louis and had proceeded on foot, upon the footway provided, as far as midway of the north approach at the east end of the bridge, at a point twenty-five

feet above the ground; that a drove of not less than twenty-five mules, which had passed her, became frightened at a locomotive, turned and ran back, one at least running into the footway where she then stood; that the south approach was closed for repairs; that there was no rail or other barrier between the roadway and footway on the north approach to prevent the mules from crossing into the footway where appellee stood. In addition to the uncontradicted facts, appellee testified she was returning from St. Louis to her home in East St. Louis, across the bridge; that she paid her fare for crossing, and while on the footway, about the middle of said north approach, a drove of mules that had just passed her going down the approach, became frightened and stampeded and turned and ran up the approach toward her, and three or four of them crossed into the footway, where she stood clinging to the outside railing, ran against her and squeezed and crushed her against the railing, and thereby her side and back were injured, her eyesight became impaired and her kidneys were affected; that she remained at times unconscious during three or four days after the accident and was confined to her bed for two weeks by reason of her injuries; that her health had been bad since the accident and she had been unable to do her housework; that she had been healthy and her eyesight was good before her injury. The testimony of the physician attending her tended to strongly corroborate her statement touching her condition and injuries, and he further testified her injury would permanently affect her nervous system. A consulting physician, who examined her shortly after the accident, concurred with the attending physician in his diagnosis and also corroborated appellee in material points as to the character and consequences of her injury.

Dr. Perryman testified he knew the plaintiff; that from her statement on the stand and the testimony of her physician, his opinion was that she had concussion of the spinal cord and of the back; that if the concussion of the spinal cord is serious it may be permanent; if slight it may pass away in a short time, but it is liable to leave behind it a train of nervous disorders that may lead to serious troubles afterward. Two

boarders in plaintiff's house, who saw her every day, corroborate her as to her condition on the evening of her injury, and for three or four days thereafter, and as to the time she was confined to her bed, and testify to the fact that she had repeated spells of prostration and sickness thereafter, and before her injury was a strong, healthy woman. Two ladies testified also and corroborated plaintiff in material points, and the girl who worked for plaintiff testified substantially as the two boarders did. As against this evidence, Bogue, who was one hundred yards from plaintiff when the mules stampeded and came back, testified he saw them run back up the approach and saw them pass plaintiff; did not think they ran into or against her. Galvin, a bus driver, who was also about one hundred yards from place where plaintiff stood, and who was on his omnibus driving west when the mules stampeded, testified he saw the mules run past her, but they did not touch her. Each of these witnesses admitted one of the mules, at least, got over into the footway. Young, a bridge watchman, testified he was on the turn roadway that goes down under the bridge to the levee, and Bogue called his attention and informed him the mules had stampeded and there was a lady on the approach; that he went up to plaintiff and as far as he could see she was conscious; she might have been unconscious; if she was he could not see it; she said she was frightened; said she was subject to heart disease and expected to go home and be sick for two weeks; did not claim that the mules ran against her; he walked with her down the approach. Dr. Kohl heard plaintiff's testimony and that of the physicians on her behalf and did not agree with them that plaintiff had suffered concussion of the spine and gave his reasons for his opinion. It was the province of the jury to settle this conflicting testimony and give the weight and credit to the evidence introduced on behalf of each party, which they believed it was entitled to. Doubtless they took into consideration the distance Bogue and Galvin were from plaintiff, the means and opportunity each had to see and know whether plaintiff was run into by the mules as she claimed, also her mental and physical condition immediately afterward and continuing for

so long a time, referable to no other apparent cause than the injury received in the manner she described, and reached the conclusion they were mistaken and she was not. The jury saw and heard all the witnesses while testifying and had means thus furnished them, which we have not, to determine correctly the credibility of each and the weight their testimony was entitled to.

We think, after carefully examining the record in this case, the evidence justified the jury in finding that appellee was seriously and permanently injured by the frightened mules running against her and pressing her against the outside railing, where she had retreated to avoid them and save herself from injury; that she was in the exercise of all reasonable care for her own safety when injured, and the negligence of defendant in failing to provide reasonably safe and secure barriers to prevent live stock from crossing into the footway, or, in the absence of such barriers, failing to establish and enforce rules for securing and controlling live stock while being driven across the bridge, occasioned the injury and damage to plaintiff. It is next insisted the trial court erred in denying this motion on behalf of the defendant: "Now comes the defendant and moves the court for a rule upon the plaintiff to submit to an examination of her person by medical experts for the purpose of hearing the evidence on the trial of the cause as to the extent or the permanency of the injury she claims to have received." This motion names no persons as medical experts nor does it ask the court to name and appoint the medical experts; but aside from this the necessity for such examination does not appear. It is not suggested in the affidavit filed in support of the motion that such examination is required in order to more fully ascertain the extent and probable duration of the injury; nor does it appear there is reason to believe plaintiff feigned or simulated injuries. The only external evidence of injury was a bump or swelling on the back, which yielded to the remedies used and disappeared in a short time, and the change in the appearance of the pupils of the eyes, claimed to have taken place after the injury. We do not deem this error well

assigned. *Galesburg v. Benedict*, 22 Ill. App. 114; *Parker v. Enslow*, 102 Ill. 272.

It is next insisted the injury was caused by want of care on the part of the persons in charge of the mules, and the negligence of defendant in failing to provide reasonably safe and sufficient railing or other barrier between the roadway and footway to protect pedestrians, was not the proximate cause of plaintiff's injury, hence defendant is not liable to her. This contention is not tenable under the rule announced in *Village of Carterville v. Cook*, 129 Ill. 152.

The fourth point suggested is, that plaintiff knew the approaches were not properly constructed, by reason of having no high railing between the footpath and roadway, and that therefore it was dangerous for foot-passengers; that this was a manifest danger, known to her, because she had crossed the bridge many times, and this known danger she could have avoided by using a street car or ferry boat, or a stair-case at the approach, which plaintiff testified she knew nothing of. No accident occurred to plaintiff, or to any one else to her knowledge, except the one in question here, by reason of the absence of the rail or barrier. The bridge company invited foot-passengers to use this footway by keeping it open for their use. It took toll of plaintiff, who was a foot-passenger; she had a right to rely on their legal obligation to use reasonable care in protecting her from injury while crossing the bridge, or respond in damages for injury occasioned by failure to perform such duty. The use by plaintiff of the footway upon the approach, under the facts disclosed by the record, was not contributory negligence on her part in bringing about her injury, or absolving defendant from liability. Fifth point is, that the want of a railing separating the sidewalk from the roadway is not negligence *per se*. It is not necessary to an affirmance of this judgment that we should hold such omission negligence *per se*. The question before the jury was, whether, under all the facts and circumstances proven, it was negligence, creating liability, for defendant in this case to omit the erection of such railing. The jury evidently found it was, and the proof justified the finding. The

last point suggested is the giving certain instructions for plaintiff, and refusing to give certain instructions requested on behalf of defendant. The ruling of the Circuit Court in this regard is assigned for error. An examination of the evidence and all the instructions given and refused, leads us to the conclusion that the jury were fully and fairly instructed by the court, and that the refused instructions ought not to have been given.

No error requiring the reversal of the judgment appearing to us, it is affirmed.

Judgment affirmed.

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1928	2 44
39	876
106	644

MUDDY VALLEY MINING & MANUFACTURING COM- PANY

V.

HERMAN PHILLIPS.

Master and Servant—Negligence of Master—Personal Injuries—Explosion of Gas in Mine—Miners' Lamps—Ventilation—Act of 1887—Evidence—Instructions.

1. It is for the jury to say from the evidence in a given case whether the admitted failure of the defendant to perform his statutory duty was wilful.

2. In an action by an employe to recover for personal injuries suffered through the alleged negligence of his employer, a mining corporation, this court holds that through the wilful neglect of its statutory duty, a dangerous accumulation of gas took place, whereby the plaintiff was injured, and declines to interfere with the verdict in his behalf.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of Jackson County; the Hon. O. A. HARKER, Judge, presiding.

Messrs. GREEN & GILBERT, and YOUNGBLOOD & BARR, for appellant.

Mr. WILLIAM A. SCHWARTZ, for appellee.

GREEN, J. Appellee was employed in the coal mine operated by appellant and was burned and seriously injured by an explosion of gas in its mine. The gas exploded by taking fire from the lighted lamps worn in the caps of appellee and another miner, whom he was then assisting to move a platform used to catch the coal and prevent it from falling into the mud and water, as it was blasted from the side of the entry and to provide a more convenient means for handling and loading the coal. This platform was made of planks, and was moved as the work of blasting coal progressed. Appellee was employed to work by the day, and on the morning he was injured had been working about fifty or sixty yards distant from the place of accident, loading rock, and had gone for oil for his lamp to the oil room, near said place; had filled his lamp and started back when he was called by the miner to assist in moving the platform, which he did, and while so engaged the explosion occurred. The foreman of appellant, in charge of the men, had told appellee to assist any of them when assistance was needed, and he was acting in compliance with this order when injured. To recover damages for his injuries, appellee brought this suit, and judgment for \$638 and costs was entered in his favor, to reverse which this appeal was taken. The right to maintain this suit is based upon these provisions of the act in force July 1, 1887: "The owner, agent or operator of every coal mine, whether operated by shaft, slope, or drift, shall provide and maintain for every such mine a good and sufficient amount of ventilation for such men and animals as may be employed therein, the amount of air in circulation to be in no case less than 100 cubic feet for each man and 600 cubic feet for each animal, per minute, measured at the foot of the down cast, * * * and said volume of air shall be forced and circulated to the face of every working place throughout the mine, so that said mine shall be free from standing powder-smoke and gases of every kind. * * * All mines in which men are employed shall be examined every morning by a duly authorized

agent of the proprietor to determine whether there are any dangerous accumulations of gas, or lack of ventilation or obstructions to roadways or any other dangerous conditions, and no person shall be allowed to enter the mine until such examiner shall have reported all the conditions safe for beginning work."

The evidence shows the mine of defendant was operated by shaft; that on November 15, 1888, defendant leased the mine from William P. Elliker and continued to operate it from that date up to and at the time of appellee's injury on April 5, 1889. Forty men and three mules were then employed; rooms had been opened, coal was mined, transported to the shaft, hoisted to the surface and several car loads were shipped daily; and Marion C. Wright, the president of defendant company, testified said company was *operating* the mine April 5, 1889; such being the facts, the statute imposed upon the defendant the duty to provide the given amount of air per minute, measured at the bottom of the down cast, and *force and circulate* it to the face of *every working place* throughout the mine and by this means free the mine from standing powder, smoke and *gases of every kind*. It was also defendant's duty, under the statute, to cause its authorized agent to examine the mine every morning to determine whether there were any dangerous conditions, or dangerous accumulations of gas and report all the conditions safe for beginning work, and until that was done not to allow appellee or other employes to begin work in the mine. The performance of the statutory duties thus imposed was required to effect the purpose of the act: "To provide for the health and safety of persons employed in coal mines;" and this case furnishes an example, as we think, of the necessity for such legislation and the enforcement of the law. Defendant failed to perform either of the duties required, and the jury were justified in finding by the evidence that the failure by defendant to comply with said provisions was wilful and caused the accident and injury to appellee. The defendant knew gas was usually found near and about a fault, as it is termed. It was from such a place the gas came, and he knew the fault

was in the entry at the time, and near the place appellee and the man he helped were at work. Other witnesses testified to the presence of gas in the coal there; moreover an instrument to detect the presence of gas was at the mine, but not used until after the explosion, and was then put in use. After the explosion air was forced and circulated into said entry by a method that would have been practicable before the explosion and would have probably freed the entry from gas and prevented the accident. In view of all the facts proven, it can not fairly be contended that the admitted failure by defendant to perform the statutory duties was not wilful. The jury so found, and it was a question to be determined by them from the evidence. *Hawley v. Daily*, 13 Ill. App. 394.

The court gave the jury four instructions on behalf of plaintiff. The first informed the jury what duties were imposed upon the owner, agent or operator of a coal mine by the statute, which was correctly quoted; but the criticism made by appellant's counsel is that it omits the mention of the clause: "For an injury to person or property occasioned by any wilful violations of this act, or *wilful* failure to comply with its provisions, a right of action shall accrue." If this instruction had called for a finding against defendant, it would have been defective because of the omission; but as given, stated the law correctly, and was not calculated to mislead the jury. The remaining three instructions relate to the damages and the facts proper to be considered by the jury in assessing the same, in case defendant was found guilty, and we see no serious objection to either of them. It is further contended the court erred in refusing to give seven instructions requested on behalf of appellant. The first of these had already been given in defendant's sixteenth instruction to the jury. The fourth refused instruction had also been given in defendant's eighth instruction to the jury. The fifth refused instruction was also given in defendant's fourth instruction to the jury and the seventh refused instruction was given in defendant's fifteenth instruction to the jury. The third and sixth refused instructions were properly refused. The principle embodied in the second refused instruction is sufficiently

stated in several of the instructions given for defendant, although not in the same form, and in the seventeen instructions which were given on its behalf to the jury, no legal proposition stated in the form most favorable to defendant and that could have been in any manner applicable, seems to have been omitted. Our conclusion is, that the evidence established the facts that the place of injury was in a mine then being operated by defendant; that appellee was a man then employed in the mine by defendant and was entitled to the protection afforded by the performance of the duties imposed by the statute (*Coal Run Co. v. Jones*, 19 Ill. App. 371); that defendant wilfully failed to perform its statutory duties and hence there occurred a dangerous accumulation of gas which took fire and caused the accident and injury to plaintiff charged in his declaration. We perceive no error requiring the reversal of the judgment and it is affirmed.

Judgment affirmed.

39	380
60	617
39	380
70	648

ISOM W. LUSK
v.
LEWIS B. PARSONS.

Practice—Bill of Exceptions—Absence of.

1. The rulings of the trial court upon questions arising in the progress of a given trial must be preserved in a bill of exceptions duly authenticated; likewise the objections and exceptions; otherwise this court can not review such rulings, nor can the party excepting thereto have the benefit of such exceptions herein.

2. Recitals of the clerk of the trial court in the transcript of the record as to what was done in a given case, are extra-official and of no legal effect.

[Opinion filed February 2, 1891.]

IN ERROR to the County Court of Clay County; the Hon. B. D. MONROE, Judge, presiding.

Lusk v. Parsons.

MESSRS. CHESLEY & BOYLES and G. A. HOFF, for plaintiff in error.

MR. RUFUS COPE, for defendant in error.

GREEN, J. There is no bill of exceptions in this record, hence we can not consider and pass upon the points presented on behalf of plaintiff in error, touching the alleged errors of the trial court in sustaining defendant's demurrer to the evidence, overruling plaintiff's motion for a new trial and entering judgment for defendant. The rulings of the court below upon questions arising in the progress of the trial, must be preserved in a bill of exceptions and also the objections and exceptions; otherwise we can not review such rulings, nor can the party excepting thereto have the benefit of such exceptions here. The bill of exceptions authenticated by the signature and seal of the presiding judge is the only proper source to which we can resort for information concerning the actions and rulings of the court during the trial, the nature of the objections and exceptions thereto and the reasons given, if any, for such objections. When thus authenticated and filed the bill of exceptions becomes a part of the record. In the transcript of the record in this cause we find recitals that there was a demurrer to plaintiff's evidence considered by the court, and the jury discharged, a finding and judgment for defendant, then a motion made by plaintiff for new trial overruled and exception by plaintiff to the overruling of such motion. It is immaterial that such recitals are made by the clerk; they are matters that can not become a part of the record unless they are incorporated in a bill of exceptions and the recitals by the clerk in that respect are extra-official and of no legal effect. Repeated decisions of the Supreme Court fortify the views above expressed and announce a rule we are not at liberty to disregard. Among the latter of such decisions will be found *Gould v. Howe*, 127 Ill. 251; *Bank of Lawrence County v. Le Moyne*, 127 Ill. 253. The judgment of the County Court is affirmed.

Judgment affirmed.

THEODORE STEYER, GUARDIAN,
V.
WILLIAM S. MORRIS, GUARDIAN AD LITEM.

*Guardian and Ward—Funds of Ward—Failure to Keep at Interest—
Sec. 22, Chap. 64, Starr & C. Ill. Stats.*

1. In the absence of evidence to the contrary, it will be presumed that a guardian might have kept funds of his ward at interest.

2. Where such funds continue to be in excess of expenditures in behalf of the ward, failure to so invest at reasonable intervals will render the guardian liable for interest.

3. The estate of a ward should not be charged for legal services rendered his guardian, in a controversy arising through such guardian's fault.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of Pope County; the Hon. ROBERT W. McCARTNEY, Judge, presiding.

Messrs. ROSE & SLOAN, for appellant.

It was strenuously claimed by the appellee in the court below that no matter how small the amount of money in the hands of the guardian or for what purpose it might be needed for the care and support of the ward, that still the guardian was compelled to loan the same. And although the guardian may have honestly thought, and had good reasons to believe (as in the case at bar), that the small amount on hand was liable to be called for at any time in the care of his ward, yet it should be loaned, and in support of this theory cited *Hughes et al. v. The People*, 111 Ill. 458; also, *McIntyre v. The People*, 103 Ill. 142; contending that by these decisions the statute was mandatory as to the loaning of money, however small the amount or however necessary it might be to use the same during the current year for the support of the ward. We hold that a careful reading of these cases, cited by the appellee in the lower court, sustain our theory of this case, viz., that the guardian is only liable for interest on such

Steyer v. Morris.

sums as may not reasonably be needed for the support of his ward during the current year. These decisions show that the statute does not change the common law as to the duty of the guardian to loan any balance in his hands not needed or likely to be needed for the support of his ward, but that the mandatory part of the statute is, that the guardian "shall loan the money on the approval of the court." These decisions do not sustain the theory of appellee in this case, but on the contrary show how unreasonable such theory is. We call attention to the following expressions in opinion cited above, 103 Ill. 142: "At common law it was the duty of the guardian to loan the money of his ward (not needed for the present use of his ward)." * * * "If the guardian kept such moneys in his possession without use, when, by the exercise of ordinary care he might prudently have put the same at interest, he is chargeable with interest upon the same." Do we understand from this that the guardian may not say, as did the guardian in this case, "I have a small balance now that may be needed at any time for the care of my ward, and I can not prudently loan the same?" Or what is meant by the last clause of Sec. 22, Chap. 64, Starr & C. Ill. Stats., where it says "the guardian shall be chargeable with interest upon any money which he shall wrongfully or negligently allow to remain in his hands," etc. The failure to loan the ward's money must be wrongful or negligent before the guardian can be charged with interest. Will any prudent man say, after reading the uncontradicted evidence of Steyer, the guardian, in this case, that the keeping on hand of a small balance for the use of his ward was either wrongful or negligent? The report made by the guardian from time to time, his evidence, and in fact everything in this record, show that he was a careful, painstaking guardian, at all times looking after the interest of his ward, as in the case of collecting insurance, and striving to increase her rents, as shown from his evidence. And if he was looking after his ward's welfare and interest, and as a prudent man, kept a small balance on hand to meet contingencies, shall he be made to pay interest on these amounts because the contingency did not arise? If so, then if the

ward had become sick, or if, as he says in his evidence, the board had been increased so that every dollar would have been expended, still, under the construction contended for, he would have been liable for interest.

If a guardian act in good faith, and as a reasonably prudent man would act under the circumstances, then he is not liable for a mere error of judgment. *Hughes v. The People*, 10 Ill. App. 148, and authorities there cited.

If the guardian has an excuse for failure to loan his ward's money, that is reasonable, he will not be chargeable with interest. Sec. 22, Chap. 64, Starr & C. Ill. Stats.; 1 Parsons on Contract, 5th Ed., 122, 136; *Bennett v. Hamfin*, 87 Ill. 36.

And the guardian may retain on hand a proper surplus to meet current and contingent expenses, and also sums which are too small to be wisely invested. 3 Wait's Actions and Defenses, 550, paragraph 4, and authorities there cited; and also 4 Wait's Action and Defenses, 141, paragraph 17; also 9 American Encyclopedia of Law, 117, note 3, and authorities there cited; also note 1, page 119, *Idem.*, and cases cited; *Gott v. Culp*, 2 American Probate Reports, 69.

Mr. W. S. MORRIS & SON, for appellee.

We insisted and now insist, that Sec. 22, Chap. 64, Starr & C. Ill. Stats., as it now stands in the book, and as it is amended by the act of June 8, 1887 (Vol. 3 of Starr & C. Ill. Stats. 325), will bear no other construction than that it is mandatory.

Justice Dickey, in *McIntyre v. The People*, 103 Ill. 147, says: "Were it not for this proviso it might be plausibly suggested that the primary provision that the security should be approved by the court, is merely directory; but when it is said that such loans may be extended without such approval, it is necessarily implied that the original loan by the guardian must be made with the approval of the court. This being the mandatory requirement, the guardian making such loans without complying with the statute, makes the same at his own risk, and must be treated as having undertaken to assume the position of a guarantor."

Steyer v. Morris.

“It shall be the duty of the guardian to put and keep his ward’s money at interest.”

This is mandatory.

“The guardian shall be chargeable with interest upon any money which he shall wrongfully or negligently allow to remain in his hands uninvested after the same might have been invested.”

This also is mandatory.

Justice Mulkey, in *Hughes v. The People*, 111 Ill. 460–1, of the opinion referring to the *McIntyre* case, says: “That court in effect held that the statute requiring a guardian to keep his ward’s money at interest upon good security, to be approved by the County Court, is mandatory.” “If loss occurs the guardian can not exonerate himself by showing he acted in good faith.” “It is also objected the guardian should only be charged with simple interest. We do not think so; by putting out the money in the manner he did in violation of an express provision of the statute, he placed it beyond his power to make it bring compound interest, as it would otherwise have done if properly loaned. This violation of the statute was knowingly done, and therefore wilfully done.”

So far back as 1864 the Supreme Court, in *Bond v. Lockwood*, 33 Ill. 221, the court, commenting upon the statute of 1845, say: “In this State the statute requires the letting to be for one year, and that the interest shall be added to the principal at the end of each year. The appellee neglected to discharge his duty in this respect, and for such neglect of duty he would have been chargeable with interest after a reasonable time had elapsed in which to make the investment. Six months from the receipt of the money has been deemed a reasonable time for that purpose.”

From these opinions we take it the section of the statute referred to in the argument of appellant is mandatory in all its parts. The failure to loan the ward’s money is negligence, and this negligence is the violation of a mandatory statute—negatively, it is true, but it is none the less a violation.

GREEN, J. The questions here presented arise under

Sec. 22, Chap. 64, Starr & C. Ill. Statutes, imposing the duty upon a guardian "to put and keep his ward's money at interest." Exceptions were taken by both parties to the decree below, and error is assigned by appellant for allowing interest upon uninvested funds of the ward. Appellee assigns for cross-errors the allowance of \$20 attorney's fee, failing to charge the guardian with interest on balances as shown by his reports, and in considering the evidence of Steyer. Appellant's counsel contend, under the facts proven, it was error to allow any interest upon uninvested balances in the hands of the guardian, because he did not wrongfully *or negligently* fail to reinvest the same, but held the same to meet anticipated necessary expenditures for the care and maintenance of his ward, taxes, insurance and repairs. We can not sustain this contention. The record does not disclose any reason preventing appellant from loaning the ward's funds, and unless the contrary appears, the presumption is he could have done so. Appellant had the use of said funds and the receipts were always in excess of the expenditures every year, from the time he was appointed, in April, 1878, up to July 9, 1888. By his report of September, 1878, the balance in his hands was \$155.36; by report of July, 1879, \$108.96; by report of July 19, 1880, \$143.62; by next report, May 21, 1883, \$133.49; by next report, May 18, 1885, \$108.42; by the report of August 16, 1886, \$145.98, and by the report of July 9, 1888, \$96.70. With these facts, established by appellant's own reports, and the other facts above mentioned, also appearing, the duty of appellant to put and keep his ward's money at interest, as required by said Sec. 22, is quite apparent, and failing to perform such duty he must be held liable for interest on such money after the lapse of a reasonable time allowed him to effect the loaning thereof. Rowan v. Kirkpatrick et al., 14 Ill. 1; Cummins v. Cummins, 15 Ill. 33; Bond et ux. v. Lockwood, 33 Ill. 213; Gilbert v. Guptel, 34 Ill. 112; McIntire v. The People, 103 Ill. 142; Wadsworth v. Connell et al., 104 Ill. 369. The error is not well assigned. The two cross-errors we shall notice are well assigned.

Steyer v. Morris.

It was error to allow \$20 attorney's fees as a credit to appellant. The services were rendered on his behalf in contesting the exceptions to his final report, among which was the omission to charge himself with any interest upon unexpended balances held by him, and this exception was well taken. The litigation was occasioned by his fault and the ward's estate should not be charged with the services of his attorneys in the County Court rendered for himself alone. The Circuit Court, by its decree, allowed this fee and found the balance due the ward to be only \$38.82, and the court also refused to charge appellant with interest on balances shown by his reports. This was error. We have examined the record and are satisfied that, commencing with the balance of \$155.36, reported September 17, 1878, and computing the interest on it and subsequent balances in his hands up to June 11, 1889, the amount due the ward, after allowing all just credits, is at least \$114, the sum for which, with interest, judgment is asked on behalf of appellee. The order and decree of the Circuit Court is reversed, except so much thereof as orders the costs of the Probate Court to be taxed against the estate of Amelia Keller, and paid by the guardian *ad litem* out of assets in his hands, and except also so much thereof as orders said Theodore Steyer to pay the cost in the Circuit Court in this case; and the cause is remanded with directions to the Circuit Court to enter an order and decree that said Theodore Steyer pay to W. S. Morris, guardian *ad litem* of Amelia Keller, the sum of \$124.26, and the costs of the Circuit Court in this case, and in said order and decree also provide that when said Theodore Steyer shall have so paid the same as herein ordered, to said W. S. Morris and to the clerk respectively of the Circuit Court and to the clerk of this court, the costs of this suit in this court, and shall deliver proper and sufficient receipts, evidencing such payments, to the said County Court of Pope County, he shall be discharged from further liability as guardian of said Amelia Keller.

Reversed in part and remanded with directions.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY

V.

JAMES B. WALKER.

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51	390
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39	888
112	2422

Railroads—Negligence of—Injury to Stock—Evidence—Instructions.

1. Where in a given case the evidence is sharply conflicting upon material and vital questions of fact, the jury should be accurately instructed, and the instructions should be based upon the evidence.

2. In the absence of evidence going to show that a witness stands in fear of being discharged by his employer, a party to a given suit, unless he testifies favorably to the latter, an instruction should not be given based upon such assumption.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of Williamson County; the Hon. GEORGE W. YOUNG, Judge, presiding.

Messrs. CLEMENS & WARDER, for appellant.

Messrs. DUNCAN & RHEA, for appellee.

GREEN, J. This suit was commenced by appellee in a justice's court to recover damages for injury to his stock by appellant's train, alleged to have been caused by the negligence of its servants in managing and running said train. The cause was tried on appeal in the Circuit Court and a verdict and judgment for \$100 in favor of plaintiff resulted, and to reverse this judgment defendant appealed. The horses belonging to plaintiff were grazing in an open space half a mile west of a crossing over defendant's road, and as defendant's train, running east, passed the horses, they started and ran east in the inclosed public highway, parallel with the train, sometimes ahead and at times in the rear of or parallel with the engine, until they reached a point where the highway curved south, and turning at this point, continued to run toward the

crossing, over which two of the horses passed in front of the engine. The other horse was either struck by the engine or ran against the side of it and received the injuries resulting in its death. The evidence was sharply conflicting upon the material and vital questions of fact, and in this state of the proof the jury should be accurately instructed and the instructions should be based upon the evidence. Several of the instructions given for plaintiff were not accurate and were calculated to mislead or prejudice the jury to the injury of the defendant. The sixth instruction draws especial attention to defendant's witnesses and their relationship to defendant, and this is supplemented by the seventh, as follows: "If you believe from the evidence that any witness has testified under an influence of fear of being discharged by his employer or if any have manifested any personal feeling, prejudice or bias, one way or the other, such fact or facts may be taken into account by you in determining the degree of weight to be given the testimony of such witnesses; and in such case you have the right to judge of the effect, if any, likely to be produced upon the human mind by such feelings or motives on the part of a witness—may tend to warp his judgment or pervert the truth, and after applying your own knowledge of human nature and of the philosophy of the human mind to the investigation of the subject, are to judge of the weight which ought to be given to the testimony of such witness, taking the same in connection with all the evidence in the case." Omitting all other criticism of this instruction, there was no evidence that the witnesses for defendant entertained any fear of being discharged or were influenced by such fear. The only witnesses for defendant were its employes, and no employe of plaintiff testified; hence that part of the instruction—"If you believe from the evidence that any witness has testified under the influence of fear of being discharged by his employer," was not based on any evidence and is aimed at defendant's witnesses only. The effect of the instruction was to create prejudice and invite the jury to view with distrust their testimony. Instructions of this character have been condemned frequently by our Supreme Court, and among the

later cases announcing the rule that instructions should be based upon the evidence and should be accurate where the evidence is conflicting, as in this case. See *City of Sterling v. Merrill*, 124 Ill. 522; *C., R. I & P. Ry. Co. v. Felton*, 125 Ill. 458; *McGinnis v. Fernandes*, 126 Ill. 228; *Holloway v. Johnson*, 129 Ill. 367; *Wilbur v. Wilbur et al.*, 129 Ill. 392.

For the error in giving the sixth and seventh instructions on behalf of plaintiff below, the judgment is reversed and the cause remanded.

Reversed and remanded.

MARY VETTEN

V.

JOHN WALLACE.

Bastardy—Support of Child—Recovery for—Married Woman—Pleading.

1. At common law the father of a bastard child was under no obligation to support the same. The liability is statutory, and exists only when the mother is an unmarried woman.

2. The doing, or consequence of an unlawful act, can not be made the consideration of a contract.

3. The presumption is that a child born in wedlock is legitimate, and this presumption the mother will not be heard to deny.

4. An allegation that a certain person is married is the same as one setting forth that he is *lawfully* married.

5. Where, in an action by a married woman to recover for the support of an alleged bastard child, from the father thereof, the defendant showed by his plea that the plaintiff was the mother of the same, and had at the time of its birth a husband, such plea effectually meets an allegation in the declaration that defendant was the father.

[Opinion filed February 2, 1891.]

IN ERROR to the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Plaintiff in error brought this suit and in her declaration averred that defendant in error was the father of a bastard

child of the age of two years in March, 1889, and that he proposed if plaintiff in error would feed, clothe and care for said bastard child, he would pay her what it was reasonably worth; that she accepted his proposition and did feed, clothe and care for the child for a period of twenty-five months and that it was reasonably worth \$10 per month, which sum the defendant in error refused to pay, etc.

The defendant pleaded the general issue and this special plea: "And now comes the defendant, and for further plea in his behalf, says, *actio non*, for that he says the plaintiff in the above entitled cause, the said Mary Vetten, is the mother of the child mentioned in said declaration and alleged to be a bastard, and the said plaintiff is now and was at the birth of said child, a married woman, having been on, to wit, the 11th day of March, 1873, in the county of Madison, in the State of Illinois, married to one Henry Koch, and that the marriage relation still exists between the plaintiff and the said Koch, and this the defendant is ready to verify."

A demurrer was interposed to this special plea, which was overruled by the trial court, and the plaintiff electing to stand by her demurrer to this plea, judgment was entered on demurrer for defendant. Plaintiff brings the case to this court and assigns as error the overruling the demurrer to the special plea.

Mr. WILLIAM J. CLUCAS, for plaintiff in error.

We concede that at common law a married woman was not a competent witness to prove non-access by the husband, but our statute declares that "no person shall be qualified as a witness in any civil action, suit or proceeding, etc., except as hereinafter stated, by reason of his or her interest in the event thereof as a party or otherwise," etc. Sec. 1, Chap. 51, Starr & C. Ill. Stats.

We contend that this statutory provision changed the common law rule, and that a married woman is now a competent witness, and may by her own testimony bastardize her child or prove the non-access by the husband.

In Cuppy v. The State, etc., 34 Ind. 389, which was a pros-

ecution for bastardy, the relatrix was a married woman residing with her husband; she was permitted to prove non-access by the husband, etc. The court said: "A witness declared competent by statute is to be regarded as any other witness, and restrictions imposed by the common law can not be applied as restricting her testimony in the face of the express letter of the statute." Starkie on Evidence, 217.

But be that as it may, the solution of the question does not necessarily arise in this case, for the reason that the testimony of the plaintiff in error is not needed.

It is a rule in pleading, that what is alleged by one party in his pleading and not denied by the other, is considered as admitted; hence, the charge in the declaration as aforesaid, and its admission by defendant, made out plaintiff's case without resorting to her or other testimony to prove the allegations in the declaration, and the absence of the husband for more than ten years previous and up to the time the child was born. The child being a bastard, and defendant its father, being admitted of record, the plea to prevail should have alleged that plaintiff had been lawfully married.

It may be true that plaintiff was married to Koch as stated in the plea, and yet such marriage not been lawful; for instance, the husband might have been a married man at the time of the marriage with plaintiff; if so, surely the child in question is a bastard.

The plea fails to allege that plaintiff was lawfully married; such allegation of lawful marriage is essential and is required in a bill for divorce and all other pleadings where a marriage is in question. Bishop on Marriage and Divorce, Vol. 2, Sec. 331.

Surely, the allegation ought to be in a plea, and if denied, must be sustained by proof to make such plea a defense, if a defense at all; the lawful marriage not being alleged in the plea, the presumption (being against the pleader) is that the marriage was not lawful, and therefore the plea no defense, and for that reason, if none other, the demurrer ought to have been sustained.

It is said that a bastard is "*filius nullius*," and therefore

not entitled to support from any man. Whatever the rule may be where there is no proof to identify the father, it is certain that the rule does not apply to the facts disclosed in this cause, for here we have the undisputed facts: First, that the child is a bastard; second, defendant's admission that he is its father.

The facts admitted, the law of nature, as well as the law of the land alike, require the putative father to support and maintain his minor child. In *Glidden v. Nelson*, 15 Ill. App. 297, the court say: "But upon the strength of the natural or moral obligation arising out of the relation of the putative father to his child, an action at common law lies for its maintenance and support upon an express promise." *Wiggins v. Keiser*, 6 Ind. 252, is a case in point.

In *Todd v. Weber*, 95 N. Y. 181 (see *American Reports*, Vol. 47, page 24), the court says: "Indeed, it has never yet been held that there was anything illegal in an undertaking by a putative father to support his bastard, or pay a sum of money in consideration of such support being furnished by another, though that other person was the mother of the child; upon principle and authority such a promise must be regarded as valid.

Messrs. KOERNER & HORNER, for defendant in error.

At common law a bastard child was "*nullius filius*," and could inherit from neither its father nor its mother.

In this State, by statute, it is capable of inheriting from the mother, and through her.

The mother is given the custody, care and nurture of the child, and she can recover the custody from the father and can inherit from the child.

A father can not inherit from his bastard offspring.

To relieve the mother from the entire burden of supporting her illegitimate offspring, and to prevent the child from becoming a charge upon the county authorities, the Illinois statute provides, Sec. 1, Chap. 17, *Starr & C. Ill. Stats.*, that an unmarried woman who shall be pregnant, or delivered, etc., shall proceed by an action *quasi* criminal in its nature,

and compel the putative father to support the child for a period of nine years, requiring a bond as security for a compliance with the judgment of the court. Such is in substance the statute of most of the States, differing, however, materially from the statute law of Indiana, which law allows the bastardy proceeding under the statute to be commenced by a married female complainant.

Based upon this statute is the opinion in *Cuppy v. The State*, etc., 34 Ind. 389, cited by plaintiff in error.

Our statute has not only failed to give relief to a married woman who is the mother of a bastard child, but goes further and excludes her from all relief, by expressly limiting the action to an unmarried female.

In the action of the Legislature of this State, in expressly excluding a married woman from any benefit under the statute, we find a manifestation of that spirit which pervades the common law, and which spirit became so firmly established as to give birth to the principle which has become axiomatic, viz., "a married woman is estopped from bastardizing her own issue."

It is a conclusive presumption of law, as against husband and wife, that a child born during marriage is legitimate. *Greenleaf on Evidence*, Vol. 1, Para. 28, p. 37.

"For reasons of public decency and morality, a married woman can not say that she had no intercourse with her husband, and that her offspring is spurious." 1 *Greenleaf on Evidence*, Para. 344, p. 444; *Dennison v. Page*, 29 Penn. 420; *Parkens v. Day*, 15 N. H. 45; *People v. Ontario*, 15 Barb. 286.

And this refusal to allow a married woman to testify as to the spuriousness of her own offspring was not the result of the common law rule of evidence, which prevented a party interested, or a party to a suit, from testifying, and which disability is removed by the statute law removing the disability of parties plaintiff and defendant, as is urged by the plaintiff in error. But this estoppel arose from sentiments of common decency, public policy and religion.

In *Drennan v. Douglas*, 102 Ill. 341, the court says: "The violation of the marriage obligations by a married woman, by committing adultery and becoming pregnant by one not

her husband, under an alleged promise of marriage, can not be made the foundation for a consideration to support a promise by the seducer to make a will giving her and the child all his property."

The court further says that the complainant "violated the laws of the State and was guilty of adultery, and then in turn undertakes to make these violations of duty and law the foundation for a consideration to support a promise, which she calls upon a court of equity to enforce. A court would stultify itself should it grant relief under such circumstances."

It is a fundamental principle of the law of contracts, that the doing of, or the consequences arising from an unlawful act, can never be the consideration for a contract.

The matter arising from the declaration and the first special plea in this case clearly show a case within the meaning of the aforesaid law.

A married woman is unfaithful to her marriage vows, she commits adultery, is therefore guilty of a crime, and then comes into court and seeks to make the consequences of that crime the foundation for an action at law.

The point is made by plaintiff in error that the plea should have charged a lawful marriage, and that the plaintiff might have been married and yet not lawfully married. We hardly suppose that the point is made seriously, and rather hesitate to enter into an argument upon it before this court.

We would answer that the word marriage is a word of law; there can be no marriage unless lawful. An unlawful marriage is an impossibility. If any of the legal requisites are wanting in an executed contract of marriage, at law it is no marriage.

It is very true that the father is bound by an express promise, and sometimes by an implied promise, to support a bastard child. The authorities are quite clear, if the father recognizes the child as his own, assumes the custody of the child, and exercises control over its person, that he is liable upon an implied promise for necessities furnished to the child. He is likewise liable to the mother, or to a third person, upon an express promise.

But we are unable to find any authority overruling the common law principle requiring the plaintiff, in a proceeding of this nature, to be an unmarried woman.

In *Glidden v. Nelson*, 15 Ill. App. 297, the plaintiff was an unmarried woman. It sometimes happens in collateral proceedings, the question of legitimacy is inquired into to settle disputes as to the rights of heirs even when the mother is married at the time.

In cases of this character it is allowed to prove the absence or non-access of the husband, or even the husband's impotency can be proved. But the rules governing these cases are very different from those governing the one at bar.

REEVES, J. By the demurrer it was admitted that the plaintiff in error was the mother of the alleged bastard child, and that she was at the time of the birth of the child the wife of Henry Koch, to whom she was married March 11, 1873. The child was born, according to the averments of the plea, in wedlock, between plaintiff in error and Henry Koch. If defendant in error was the father of the child, plaintiff in error must have been guilty of adultery. Taking the declaration and plea together, it is manifest that the consideration for the promise alleged in the declaration was the fact that the plaintiff in error was the mother, and defendant in error was the father of the child.

The father of a bastard at common law was not under any legal obligation to support his illegitimate child. He is only made liable under our statute where the mother is an unmarried woman. The alleged bastard child, the support of which was the basis of the alleged promise by defendant in error to pay, was the result of the criminal intimacy of plaintiff in error, a married woman, with defendant in error, so that the consideration of the promise alleged is shown by the plea to involve a criminal offense on the part of the person to whom the promise was made. The doing of an unlawful act, or the consequence of an unlawful act, can not be made the consideration of a contract. As was said in *Drennan v. Douglas*, 102 Ill. 341, a married woman can not make her own

Vetten v. Wallace.

violation of duty and law the foundation for a consideration to support a promise. Again, a married woman will not be permitted to bastardize her own offspring, born in wedlock.

“For reasons of public decency and morality, a married woman can not say she had no intercourse with her husband, and that her offspring is spurious.” 1 Greenleaf on Ev., Sec. 344. This prohibition does not apply to her competency as a witness, but is a rule of law governing any right of action which she may set up, involving such bastardism of her own offspring, born in wedlock. The presumption is that a child born in wedlock is legitimate, and this presumption the mother will not be heard to deny. 1 Greenleaf on Ev., Sec. 283.

It is urged that the plea should have alleged that the plaintiff in error was lawfully married to Henry Koch. There can be no marriage unless it be a lawful one, hence the allegation that plaintiff in error was married to Henry Koch was equivalent to saying she was lawfully so married. A traverse of the plea would have enabled plaintiff in error to show that at the time of the birth of the child she was not the wife of Henry Koch. This suit was brought to recover for necessities furnished by plaintiff in error to the child. These necessities it was the duty of her and her husband under the law to furnish. This case differs from *Todd v. Weber*, 95 N. Y. 181, in this, that the mother of the child was an unmarried woman, and the recovery was had by persons who were under no legal obligations to support the child, and was based upon the fact that the putative father recognized the child as his, and promised these people if they would care for and support the child, he would pay them for such care and support.

It is urged that by the plea, defendant in error admitted he was the father of the child, as averred in the declaration. If the plea was true, then this allegation in the declaration was not true; at least the plaintiff would not be heard to make such an allegation. When the defendant by his plea showed that plaintiff was the mother of the child, and was at the time it was born the wife of Henry Koch, this effectually, under the law, met the allegation of the declaration that defendant was the father of the child. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

39 398
43 380

EAST ST. LOUIS UNION RAILWAY COMPANY .

V.

CITY OF EAST ST. LOUIS.

*Municipal Corporations — Streets—Use of by Railroad Company—
Instructions—Ordinance—Jurisdiction—Practice.*

1. Failure to advise this court by assignment of error upon the record of the errors relied upon to reverse in a given case, will excuse it from a further consideration thereof.

2. A municipality may revoke an ordinance granting a right of way through its streets, before the same has been accepted.

3. Where the evidence in a given case is not preserved in the record, this court will assume that it authorized the findings.

4. The specific finding of the truth of an allegation in a bill, not denied, but inferentially admitted, is not necessary to support a decree for complainant in a given case.

5. This court declines, in view of the evidence, to interfere with a decree perpetually enjoining a railway company from building a railroad in or upon a certain street in a municipality named.

[Opinion filed February 2, 1891.]

IN ERROR to the Circuit Court of St. Clair County; the
HON. WILLIAM H. SNYDER, Judge, presiding.

MESSRS. KOERNER & HORNER, for plaintiff in error.

MR. CHARLES W. THOMAS, for defendant in error.

GREEN, J. On December 14, 1883, defendant in error filed its bill for injunction in the City Court of East St. Louis, against plaintiff in error, and on December 19, 1883, a change of venue to the Circuit Court was ordered upon the application of the defendant, and on December 20, 1883, its answer was filed. On the second Monday of the February term, 1884, the temporary injunction was dissolved on defendant's motion, and the cause was continued from term to term until the September term, 1884, when the cause was heard upon the

bill, answer, exhibits and testimony, and a decree was entered perpetually enjoining defendant, its servants, agents and successors, from building any railroad in or upon Front street, in the city of East St. Louis, or any part thereof, and from operating or maintaining any railroad therein. To reverse the decree this writ of error was sued out.

We are not advised by any assignment of error upon the record, of the errors relied upon to reverse and this omission would relieve us of the labor of examining the record further; but we would not be inclined to reverse for any of the reasons suggested in the printed argument of plaintiff in error had this omission been supplied.

The right to the relief prayed for and decreed, is based upon the allegations that the only grant of right of way to plaintiff in error, over, upon and along Front street, was the city ordinance, passed November 28, 1882, and that ordinance was the only one whereby any right of way was given to plaintiff in error upon any street of said city; and before said plaintiff in error had built or constructed any railroad or part of any railroad in said street, or had expended any money or other valuable thing upon the faith of and because of the passage of said ordinance, or acquired any vested right thereunder, the said ordinance was, on June 11, 1883, repealed; that said Front street was dedicated to said city prior to 1870 and was by it accepted, upon the condition that it should be forever kept open as a public highway for ordinary travel, and the building and operating of a railroad on said street by plaintiff in error would close said street as a public highway, within the meaning of the dedication, and render it entirely incapable of accommodating the great travel daily passing over it; that plaintiff in error, unless restrained and enjoined, would begin the construction of the railroad in said street, or do some act which would give it some vested rights under the repealed ordinance, and complete and operate its railroad as it threatens to do. The findings in the decree are, first, the general finding that the material allegations in the bill are true; and then specific findings upon each allegation thereof are set out in detail, whereby it is shown the court found each

of said allegations to be true, except that alleging the threatened completion and operating of the railroad by defendant, which is not denied by the answer.

It is contended on behalf of plaintiff in error that its right to construct and operate its railroad is fully recognized in the cases of Wiggins Ferry Co. v. E. St. Louis Union Ry. Co., 107 Ill. 450, and E. St. Louis Connecting Ry. Co. v. U. Ry. Co., 108 Ill. 271, and such right can not now be questioned by defendant in error. An examination of these cases satisfies us they do not support the contention. It is also contended that the city, by its ordinance, granted a right of way and was powerless to revoke it by the subsequent repealing ordinance, and among other authorities cited in support of this point is City of Quincy v. Bull, 106 Ill. 352. In this case the grant was accepted and money was expended, work was done and several miles of water-mains were laid down, all upon the faith of the accepted grant, before the city attempted to avoid its contract. In the case at bar, the bill alleges, and the court by its decree specifically finds, that before plaintiff in error had made any expenditure upon the faith of and because of the passage of the ordinance of November 28, 1882, and before it had acquired any vested rights thereunder, the same was repealed. The grant was not accepted by the corporation, hence the city had the right to revoke it. It is also urged as a ground for reversal, that the evidence is not preserved; that the decree has nothing to support it, except the recitals of findings and these are all on immaterial facts. The evidence introduced on the hearing is not before us and we must presume it was sufficient to authorize the findings. It appears by the recital in the decree that the cause was heard upon the bill, answer, exhibits and testimony, and being so heard and the court being thus fully advised, it finds generally, and also *specifically* as before stated. Its findings were responsive to the issues and found all the material facts necessary to maintain the bill in favor of the complainant, and we can not, in this state of the record, assume that anything appeared to the court to be a fact except that which so appeared from the evidence. Wheeler v. Wheeler, 18 Ill. 39; Moore et al. v. School

City of Olney v. Riley.

Trustees, 19 Ill. 82; Jones v. Neely, 72 Ill. 449; Durham v. Mulkey, 59 Ill. 91.

It is further insisted there is no evidence to support the material allegation that defendant "threatened to build its tracks and unless restrained would do so." This allegation was not denied by the answer, which sets up a right in defendant to build and operate its road on said street; hence the specific finding of the truth of an allegation, not denied but inferentially admitted, was not necessary to support the decree. That a court of equity has jurisdiction in this class of cases is settled, as we think, in Jacksonville v. Jacksonville R. R. Co., 67 Ill. 540, where a like injunction was decreed and was sustained by the Supreme Court. No sufficient reason to us appearing why the decree should be reversed, it is affirmed.

Decree affirmed.

THE CITY OF OLNEY
V.
THOMAS B. RILEY.

Municipal Corporations—Negligence of—Street Crossing—Personal Injuries—Evidence—Instructions.

1. Want of reasonable care on the part of the officers of a city as regards the keeping in repair of streets, crossings, and the like, will warrant a recovery for personal injuries suffered by reason thereof. Gross negligence is not necessary to entitle a plaintiff to recover in such action.

2. In the case presented this court holds that an instruction asked in behalf of the defendant, was properly modified by the trial judge, and declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of Richland County; the Hon. C. C. Boggs, Judge, presiding.

Mr. JOHN LYNCH, JR., for appellant.

Messrs. R. B. WITCHER and ALLEN & FRITCHEY, for appellee.

GREEN, J. This suit in case was brought by appellee to recover for personal injuries alleged to have been occasioned by the failure of appellant to keep a certain street crossing in reasonably safe condition. The jury found for plaintiff and assessed his damages at \$225, and judgment was entered on the verdict. To reverse this judgment, defendant appealed. No witnesses were introduced on behalf of defendant below, and the evidence on behalf of plaintiff fully sustains the verdict. The damages were not excessive. Plaintiff's leg was broken and his ankle injured when he fell at the crossing. He was confined to his room by reason of his injuries, five or six weeks, and was unable to work for a period of more than three months. He suffered great pain during the time he was confined to the house, and his physician's bill was \$34.50. He was a miller by trade, earning \$2.50 per day at the time of his injury. These facts would have justified the jury in allowing a much larger sum than the amount recovered if they found defendant guilty. The instructions given for plaintiff stated the law correctly and were applicable to the facts proven. Complaint is made of the modification of several instructions asked on behalf of defendant, but an inspection of the record discloses the modification of but one. The first instruction for defendant, which appellant claims was modified by the court, is preceded by these words: "And, thereupon, the defendant asked the court to give the jury the following instructions:" then follows the instruction (including the language claimed to have been added by the court), which is marked, "Given," and nothing in the record indicates that the instruction as given is not the instruction as requested by defendant, unless two bracket marks, *in pencil*, inclosing the words said to have been added, should be held to furnish such indication. How or when these marks were so placed is not explained. The instruction which the record does show was modified, was as follows:

"You are instructed that a city is not liable for every acci-

City of Olney v. Riley.

dent that may occur upon its sidewalks, but to establish a liability to the plaintiff, it must be shown by a preponderance of the evidence that the officers of the city are guilty of gross negligence, or want of ordinary care; not only that an injury was received by the plaintiff, but must also show that the injury was occasioned by a failure of the city to keep in a reasonably safe condition the sidewalk or crossing at the time and place in question; further, that the plaintiff was, at the time of the injury, using ordinary and reasonable care for his own safety." The court changed the language and then gave the instruction as follows: "You are instructed that a city is not liable for every accident that may occur upon its sidewalks, but to establish a liability it must be shown by a preponderance of the evidence, not only that an injury was received by the plaintiff, but must also show that the injury was occasioned by a failure of the city to keep in a reasonably safe condition the sidewalk or crossing at the time and place in question; further, that the plaintiff was, at the time of the injury, using ordinary and reasonable care and prudence for his own safety." It is quite apparent the instruction as asked for ought to have been modified or refused. It was not required that the evidence should show the officers of the city guilty of gross negligence to entitle the plaintiff to recover, but a want of reasonable care on their part would be negligence creating liability. Perhaps the modified instruction might have been framed with more accuracy, but as given it was quite as favorable for defendant as it could demand. We discover no error requiring the reversal of the judgment, and it is affirmed.

Judgment affirmed.

LOUIS NUERNBERGER
V.
EDWARD VON DER HEIDT.

Landlord and Tenant—Farm Hands—Crop Rent—Distress for—Sale of Growing Crops—Notice.

In distress proceedings instituted to recover certain rent claimed under a lease providing for a crop rent in part, for certain lands, the contention on the part of the lessee being that he had purchased such rental before the sale of the property in question to the plaintiff, this court holds that as between the grantor and the lessee, growing crops might be sold by parol contract, and declines to interfere with the judgment for the defendant, it appearing that the plaintiff had notice of the sale before the completion of the contract of purchase of said lands.

[Opinion filed February 26, 1891.]

APPEAL from the Circuit Court of St. Clair County; the Hon. GEORGE W. WALL, Judge, presiding.

On the first day of August, 1888, one Elizabeth Ballheimer leased to her uncle, the appellee, a tract of land in St. Clair county, Illinois, for a term of three years. The stipulated rental was \$75 in cash, and one-third of the wheat raised on the premises, all payable on August 1st of each year. The lease was in writing and filed for record February 9, 1889. Subsequently, on the 4th day of April, 1889, the above lessor, for a consideration of \$6,600, conveyed the same tract of land to appellant by warranty deed. The deed was filed for record on the 5th day of April, 1889. All of the rent fell due long after appellant acquired the fee simple title, and at the time it was due, the \$75 cash rent stipulated in the lease, was paid to the appellant, but on a demand made at the proper time, when the wheat was being threshed, the appellee refused to deliver to appellant the one-third of the wheat, and thereupon he began proceedings for distress. On the trial the appellee interposed the sole defense that he had purchased the one-third wheat rental from the appellant's grantor before the

Nuernberger v. Von Der Heidt.

execution of the deed to appellant. The trial was before the court without a jury, who found the issues against appellant and awarded a return of the property.

Mr. FRANKLIN A. McCONAUGHY, for appellant.

Messrs. HAY & BARTHEL, for appellee.

PHILLIPS, P. J. It is urged as grounds for reversal of this judgment, that the evidence does not show a sale of the interest in the crops by appellant's grantor. And secondly, that the grantor of appellant while the landlord of appellee, had no property in the wheat which could be the subject-matter of sale by fraud.

As between landlord and tenant, between debtor and creditor, and under our statute between executor and heir, growing crops are personal property. But between a trespasser and the owner of the soil, and a vendor and a vendee, they are real estate. *Powell v. Rich*, 41 Ill. 466. As between the grantor of appellant as the landlord of appellee, and appellee as her tenant, growing crops, being personal property, may be sold by parol contract. The evidence in this case shows the grantor of appellant sold her interest in the growing wheat to appellee, while she was still the landlord of appellee; and the weight of proof shows that appellant had notice of that sale before the completion of the contract of purchase. Appellee was in possession of the premises, and the appellant having notice of the sale, the judgment must be affirmed.

Judgment affirmed.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COM-
PANY

V.

DELLA HAWKINS.

Railroads—Liability for Injury to Contents of Trunk—Evidence—Instructions—Practice.

1. While it is the duty of a court, under the statute, to mark all instructions read to the jury, "Given," failure to do so in case of instructions shown to have been given, the omission working no harm, can not be complained of.

2. In the absence of proof to the contrary, the presumption is that the trunk of a passenger will arrive at his destination the same time he does, both starting upon a given trip at the same time.

3. The delivery of a check by a railroad company in exchange for one given thereto, is *prima facie* evidence of the receipt by it of certain baggage, and that the same was in good order. This presumption may be overcome as to its condition by evidence to the contrary.

4. To release such company from liability for damage to such baggage, it must show that it was in substantially the same condition when delivered to its owner, as when received by it.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of Perry County; the Hon. W. H. SNYDER, Judge, presiding.

Appellee, September 26, 1888, bought a ticket at Santa Anna, California, for St. Louis, and received a through check to St. Louis for her trunk. She arrived in St. Louis Thursday afternoon, October 4, 1888, and went at once to the office of appellant and bought a ticket to Tamaroa and exchanged the check she held for her trunk for the check of appellant. She left St. Louis Thursday evening on a train on appellant's road and reached Tamaroa Friday morning. Her trunk reached Tamaroa Saturday evening, October 6th. There was dry mud on the outside of the trunk, covering the front of the trunk and part of the ends and top, and when opened it was found full of muddy water and the contents damaged to

St. L., A. & T. H. R. R. Co. v. Hawkins.

the amount of \$100. It is not shown when the trunk reached St. Louis. The baggage-man on the train that carried the trunk on appellant's road, says he received it on his car in St. Louis a few minutes before 3:45 p. m., October 5th. It is shown that there was mud on the outside of the trunk; nothing else, apparently, was wrong about it. It was not marked as in bad order until it came into the possession of the baggage-man of the Wabash, Chester & Western Railroad, at Pinckneyville. It is shown that the trunk was not damaged after it left St. Louis. Plaintiff below recovered a judgment for \$100, and the railroad company prosecutes this appeal.

Mr. R. W. S. WHEATLEY, for appellant.

Mr. S. Y. HAWKINS, for appellee.

REEVES, J. The delivery of the check to appellee by appellant was *prima facie* evidence, not only of the delivery of the trunk to appellant, but also that it was in good order when received. This *prima facie* case could be overcome, as to the condition of the trunk, by proof showing that it was not in good order when received by appellant; by showing that it was in the same condition when received by appellant as when delivered to appellee at Tamaroa. There is no proof as to the time the trunk arrived in St. Louis, or when it came into the possession of appellant. It is shown that appellee arrived in St. Louis on Thursday afternoon, October 4th; the presumption would be in the absence of proof, that her trunk reached St. Louis at the same time she did. The first time that the evidence touches the trunk after its arrival in St. Louis is when it was received by the baggage-man on the train of appellant, a few minutes before 3:45 p. m., Friday, October 5th. How long before that it came into the possession of appellant is not shown. What happened to the trunk during that time is not shown. To relieve appellant from liability for the damage to the contents of the trunk, it should appear that it was in the same condition when it first received the trunk, as when delivered to appellee at Tamaroa; this the evidence does not show.

It is further urged that the evidence does not disclose that

the contents of the trunk were proper articles of baggage. The contents are spoken of by appellee as her clothing, and mentions particularly a cloak. Another witness speaks of the contents as garments. No objection was urged below upon this point, and we think the evidence tends clearly to show that the trunk contained appellee's wearing apparel.

It is said that certain instructions for the plaintiff below, copied into the bill of exceptions, are not marked "given." The record recites, "and thereupon the court gave to the jury, on behalf of plaintiff, the following instructions," and then copies plaintiff's instructions, including those not marked "given." It is clear from the record that these instructions were given by the court to the jury, and while it is the duty of the court under the statute to mark all instructions read to the jury "given," an omission, such as occurred in this case, could work no injury to any one. The fourth instruction is awkwardly drawn and not clearly intelligible; still we can see that appellant was not injuriously affected by it. The evidence does show that appellee bought her ticket over appellant's railroad, and Wabash, Chester & Western Railroad, to Tamaroa, and received a check for her baggage through, and that it was a joint check for both roads.

The sixth instruction tells the jury, in effect, that it was incumbent on appellant to relieve itself from the liability arising upon the *prima facie* case made by plaintiff, to show that the trunk was in a damaged condition when it received it, and was not damaged while in its possession, and further that if appellant received the trunk from the road to whom the check received from plaintiff was surrendered as in good condition, when it was in bad condition, this was negligence on the part of the appellant. The latter clause of this instruction should not have been given, but quite a number of defendant's instructions clearly and pointedly counteract any injurious effect that could have been done by this latter clause of plaintiff's sixth instruction.

While the record in this case is not free from error, we do not find upon the whole record such error as should reverse the case. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

OHIO & MISSISSIPPI RAILWAY COMPANY

V.

THOMAS D. RAMEY.

39	409
43	79
43	116
139	9

Railroads—Negligence—Flowage—Extraordinary Flood—Embankment—Maintenance of—Proximate Cause of Injury—Special Interrogatories—Practice.

1. It is proper to enter the general verdict in a given case without requiring the jury to return a special finding upon an interrogatory which did not submit a question that was controlling.

2. In an action to recover from a railroad company for injury to growing crops, alleged to have occurred through its negligence, this court *holds*: That the jury were justified in finding that its embankment and not an extraordinary flood caused the damage in question, and declines to interfere with the verdict for the plaintiff.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of St. Clair County; the Hon. W. H. SNYDER, Judge, presiding.

Messrs. POLLARD & WERNER, for appellant.

The statute which provides for special verdicts (3 Starr & C. Ill. Stats., p. 435) contains the following section, viz.:

Section 2. "Submitting or refusing to submit a question of fact to the jury, when requested by a party, as provided by the first section hereof, may be excepted to and be reviewed on appeal or writ of error, as a ruling on a question of law."

Now, the failure of the court to require an answer to an interrogatory submitted, is tantamount to a refusal to submit the interrogatory. *City of Wyandotte v. Gibson*, 25 Kas. 236.

The failure of the jury to answer the interrogatory is equivalent to an answer that they were "unable to agree," which leaves the verdict so incomplete as to require the jury to be discharged. *Kas. Pac. R. Co. v. Reynolds*, 8 Kas. 623.

Even where answers are made, but are not full, or responsive or clear, upon proper objection the court is bound to require the jury to properly answer the same. *Noble v. Enos*, 19 Ind. 72; *Nockes v. Morey*, 30 Ind. 103; *McElfresh v.*

Guard, 32 Ind. 408; Sage v. Brown, 34 Ind. 464; Reeves v. Plough, 41 Ind. 204.

If the question be a proper one and has been submitted, and the statute render it obligatory upon the court to submit the question to the jury when requested, the court can not withdraw it for any reason. Otter Creek Block Coal Co. v. Raney, 34 Ind. 329; Summers v. Greathouse, 87 Ind. 205; Duestenberg v. State ex rel. City of Vincennes, 116 Ind. 144.

Mr. JAMES M. HAY, for appellee.

Secs. 2, 3, Starr & C. Ill. Stats., p. 435, are not infringed, because the court submitted the question of fact requested by appellant; and the court's refusal to require the jury to answer the question, or to grant a new trial, was, in the judgment of the court, unnecessary and improper, as the verdict was just and abundantly supported by the evidence and the law.

"The provision of the statute * * * necessarily implies that the fact to be submitted shall be one which, if found, will in its nature be controlling." "A fact which merely tends to prove a fact in issue, without actually proving it, can not be said to be, in any legal sense, inconsistent with the general verdict, whatever that may be." The Chicago & North-Western R. R. Co. v. Dunleavy, Adm'x, 129 Ill. 132.

Now, because this was an extraordinary rain-fall, although not heavier than had visited the region in which this occurred many times before, it does not disprove the fact that the filling up of the trestle, the outlet south, for the surplus water, was the cause of the damage to the crops of appellee.

In building bridges and culverts, railway companies are bound to anticipate and provide against "not only the natural rise and fall of the waters during the year, but also the floods and freshets which occur at longer periods or intervals, and which, from having been known to occur, might reasonably be expected to occur again." Boehhardt v. Boom Co., 54 Wis. 107; Gray v. Harris, 107 Mass. 492; Railroad Co. v. Carr, 38 Ohio St. 448.

The identical question has been before this court, at the August term, 1889, in the cases of Charles A. Singletary and Elliot against the Ohio & Mississippi Railroad Company,

appellant, and also the same witnesses in all the cases. See 34 Ill. App. 425. In the case of Elliot, the precise question as to the extraordinary character of the rain-fall in June, 1888, was passed upon by this court. Miller, Ramey, Hoeltman and others speak of other rain-falls previous to this, in their opinion, as heavy as the one of June 16, 1888. They also testify that, for years before, the farmers and owners of land lying north, informed the appellant that they were being injured by the appellant having filled up the trestle, thereby causing and forcing the surplus water to overflow their lands, and that it must be remedied. They perceived that year by year their farms were becoming more and more liable to be damaged by reason of the increasing obstructions placed by appellant across the natural outlet of the floods. The appellant took its choice, and maintained and increased its obstructions year after year, thereby saying to the proprietors of lands north, it would assume all damages caused by its damming up the channel. The floods descended, and with them the damages to the property of appellee. Is the appellant surprised, or has it reason to be surprised, at the result of its acts?

GREEN, J. This suit was brought to recover damages resulting from the maintaining of an embankment obstructing the natural flow of water and forcing it back and over the land of appellee, destroying his crops growing thereon. The jury found appellant guilty of the negligence charged, and assessed the damages at \$700, for which amount judgment was entered. Two grounds for reversal are suggested. First, it is insisted the solid embankment maintained by appellant was not the proximate cause of the overflow complained of, but that it was caused by an extraordinary flood; second, that it was error in the court below to receive and enter the general verdict without requiring the jury to return a finding upon the following interrogatory submitted to them by the court at the request of appellant: "Was the plaintiff's damage which is complained of, the direct result of an extraordinary rain-fall of June 16, 1888?" The evidence upon the question of the character of the rain-fall at that date was conflicting, several witnesses testifying there had been as heavy

rains in that locality in prior years. The jury had sufficient evidence to justify the finding that the embankment, and not an extraordinary flood, caused the water to back up and overflow the crops of plaintiff; hence, the first point suggested is not sustained by the record. The interrogatory presented for a finding an evidentiary and not an ultimate fact. The jury by answering this interrogatory in the affirmative, would not necessarily thereby have returned a special finding in conflict with their general verdict, nor a finding concluding the plaintiff and defeating his right to recover. It might be conceded an extraordinary rain-fall of June 16, 1888, directly damaged plaintiff by overflowing and destroying his crops, and yet but for the negligence of appellant in maintaining a solid embankment unprovided with suitable and proper outlets or culverts, for the passage of the water in its natural course when heavy rains occurred, the water on June 16th might have flowed off and not have backed up and overflowed plaintiff's crops. The evidence established the fact that the embankment was a solid structure, without an opening, and absolutely dammed the water and prevented it from flowing off in its natural course, as it did before the obstruction was erected. The interrogatory did not submit a question to the jury that was controlling and it was not error to enter the general verdict without requiring the jury to return a special finding. *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132. The evidence justified the verdict. The jury were fully and very favorably instructed for appellant and no reason appears why the judgment should be reversed. It is therefore affirmed.

Judgment affirmed.

THE NEW HOME LIFE ASSOCIATION OF ILLINOIS
V.
LETHA OWEN AND RUFUS D. OWEN, FOR USE, ETC.

Life Insurance—Mutual Benefit Associations—Application—Truth as to Statements in—Verdict—Form of—Evidence—Instructions.

While an affidavit as to the state of his health, filed by an ex-soldier upon application for a pension, is admissible in an action upon a life insurance policy issued to him, as tending to show that at about the time he took out the same he was suffering from a disease which he fraudulently failed to disclose to the company, and which, if he had, would have prevented his being accepted as a risk, it is not conclusive, and the jury must determine from all the evidence, whether the facts set forth in such affidavit were true or that the application for insurance correctly stated his condition.

[Opinion filed February 2, 1891.]

IN ERROR to the Circuit Court of Jackson County; the Hon. O. A. HARKER, Judge, presiding.

Appellant issued a certificate of membership, in the nature of a policy of insurance, to Allen J. Hagler, May 10, 1884, Letha Owen and Rufus D. Owen being named as beneficiaries in such certificate. Hagler died August 10, 1888, and the association refusing to pay, suit was brought by the beneficiaries to recover upon the certificate. After suit was brought the association settled with Letha Owen and she was dismissed as a party plaintiff and the suit progressed to a judgment in favor of Rufus D. Owen for \$900. The defense to the action was set up in a special plea to the effect that Hagler, in his application for membership, made untrue and fraudulent statements and did conceal material facts, and particularly that he declared that he did not have any disease of the lungs and did not have disease of the heart, when in fact he did have both of these diseases.

Messrs. W. C. CALKINS and W. S. FORMAN for plaintiff in error.

Mr. W. A. SCHWARTZ, for defendant in error.

REEVES, J. The material question submitted to the jury upon the trial was whether Hagler had, in his application for membership, made untrue statements as to his condition of health. The testimony on this point was conflicting. The testimony offered by the plaintiff established the contention that the statements made by Hagler in his application, as to the condition of his health, were true. On the other hand, the testimony offered by the defendant tended strongly to show that, prior to May, 1884, when the certificate was issued to Hagler, he was afflicted with flux occasionally and suffered from some form of lung disease. The statements made by Hagler in his application for a pension in 1882 and 1883, were particularly relied on by the defendant to show that prior to 1884 he was claiming that he was suffering from lung disease and flux, contracted while he was in the military service, and that a pension certificate was granted him for disease of the lungs. The jury found, in answer to special interrogatories submitted to them, that at the time he made his application for membership in the appellant association he was not suffering from lung trouble or flux and that his death was caused by syphilis. It may fairly be said from all this evidence, that Hagler was not entitled to a pension. We think that the clear weight of the testimony is that Hagler was not suffering from lung disease in May, 1884. We incline to give more force to the uncontradicted testimony as to the work Hagler did from 1870 to 1886, than to the opinion of the physicians as to his physical condition. It is shown that for several years prior to 1881, Hagler was engaged for Roseboro in the woods, receiving and loading ties; was out every day, wet and dry, and was always ready for duty. From 1884 to 1886, he was a helper in a blacksmith shop, using a sledge weighing fourteen pounds, and put in good time. It would hardly have been possible for a man with diseased lungs to have performed this labor. This is not the only evidence on the part of the plaintiff as to Hagler's condition of health. Besides the general testimony of his neighbors, who knew

him at this time and testify to his general appearance of good health, there is the testimony of Dr. Edwards, who made the examination of Hagler when he applied for membership in 1884, to the effect that he examined his lungs and did not find them diseased; found his respiration full, clear and distinct; examined his throat carefully and found no evidence of bronchitis, and, so far as he could tell from his examination, he was sound in health. Dr. McNally, who examined Hagler for another policy of life insurance in June, 1884, testified that after a careful examination he found his lungs healthy; no indication of bronchitis or other disease.

This much of the testimony is referred to simply to show that there was sufficient evidence to support the verdict of the jury; and because the testimony seems to us to establish the fact that Hagler was not suffering with lung trouble in 1884, we reach the conclusion that his condition could not, in reason, have been such a year before as to entitle him to a pension on account of lung trouble. If a fraud was committed in the procuring of the pension and there was no fraud on appellant when Hagler was admitted to membership in appellant association, we fail to see any legal grounds upon which appellant can escape liability on account of the pension fraud. The only material inquiry is, was Hagler in the physical condition he represented himself to be when he made application for membership in appellant association. Of course, the affidavit made by Hagler for a pension was proper evidence in this case, but not conclusive. His application for a pension and his application for membership in the life association were in conflict, and it became necessary for the jury to determine from all the evidence which was true. They found that the statements made in the application for membership in the life association were true, and we are not disposed to disturb their finding.

Objection is taken to the form in which the jury returned their verdict. They found for the plaintiff, and assessed his damages at \$1,000, less ten per cent, and the court properly directed the clerk to enter the verdict for \$900. The objections to the plaintiff's instructions are not well taken. The

fifth instruction told the jury, that if they found from the evidence that Haglar made truthful answers to the questions propounded to him in the application, to the best of his knowledge and belief, that was all he was required to do. We fail to see any error in this. If Haglar was guilty of some immoral practice which resulted in the disease which caused his death, the certificate or contract did not provide in such case the policy should be void. The only provision on this subject found in the contract is to the effect that if the member should injure or impair his health by immoral practices, the association might, by written notice to the member, cancel and annul the certificate. This disposes of the criticism upon the seventh and eighth instructions given for the plaintiff.

Finding no error in the record that should reverse the judgment, the same is affirmed.

Judgment affirmed.

JAMES WILDERMAN ET AL.

V.

WILLIAM PITTS.

Contract to Dig Well—Recovery on—Evidence—Instructions—Practice.

1. Where, under a contract to do a certain thing, the contractor is bound to make certain tests, and is prevented from doing so by the contractee, he will be excused from the performance of such requirement.

2. Specific objections to the admission of evidence by the trial court, general objection only thereto having been made therein, can not be considered by this court.

3. In an action brought to recover upon a contract to dig a well, this court holds that the jury were justified in finding that the well, when finished, was of the capacity, and would furnish the supply of water required by the terms of said contract; that the evidence established the fact that the plaintiff was prevented by the defendants from testing the well after it was finished, and declines to interfere with the verdict for the plaintiff, although the same is for less than the contract price.

[Opinion filed February 2, 1891.]

Wilderman v. Pitts.

APPEAL from the County Court of St. Clair County; the Hon. JOHN B. HAY, Judge, presiding.

Messrs. WILLIAM WINKELMAN and J. M. HAMILL, for appellants.

Messrs. TURNER & HOLDER, for appellee.

GREEN, J. This cause has been tried twice, and each trial resulted in a verdict and judgment for plaintiff in the County Court. After the first trial the record was brought up to this court for review and we reversed the judgment and remanded the cause. The declaration in that record consisted of the common counts only, and we said in the former opinion the proof did not show plaintiff had *finished* a well of the required capacity, or had *finished* a well at all; that the contract between the parties was a special contract, by the terms of which plaintiff was to finish a well of a given capacity within a reasonable time, and until he complied with these conditions he could not rightfully demand that defendant should help test the capacity of the well. We also said: "It is only in a case where a special contract has been fully performed, so that nothing remains to be done but to pay the contract price, that a recovery of such price can be had under the common counts in assumpsit;" but the pleadings and proof in the present record differ from those in the record then before us. When the cause was redocketed below, plaintiff amended his declaration by adding to the common counts a special count averring a special verbal contract was made between himself and defendants on or about July 10, 1885, to the effect that plaintiff should bore and dig a well for defendants on their premises, which should be of the capacity, and should furnish eight barrels of water daily for two days; that defendants should pay for said well, when so dug and bored as aforesaid, the sum of \$250, and that defendants were to help test the well. It was further averred that plaintiff did then and there dig and bore said well, and upon the completion thereof, did then and there request defend-

ants to help test said well; that they refused and would not permit plaintiff to test it and refused him permission to enter their premises for the purpose of testing said well, by means whereof defendants became liable to the plaintiff to pay him said sum of \$250, and being so liable, in consideration thereof, promised plaintiff to pay him said sum on request. The breach is then averred and *ad damnum* \$500. Defendants interposed a plea which amounted to the general issue, to which plea a demurrer was sustained, and also a plea of the general issue, on which issue was joined, and upon that issue the cause was tried. The verdict and judgment was for plaintiff, for the sum of \$200 damages and costs. The special plea amounted to the general issue, and the demurrer to it was properly sustained. Upon the issue joined, on which the cause was tried, plaintiff was obliged to prove the special contract as alleged, and his compliance with its terms, or a legal excuse for non-compliance with any condition thereof before he could recover for digging or boring the well, and defendants had the right and were permitted to introduce all the evidence in their behalf to prove the well was dug under a special contract, and that plaintiff had failed to perform it. Under the special plea the proof required on plaintiff's behalf would have been the same, and so would the proof defendants could have properly introduced in their defense.

We are also of opinion the evidence in this record sustains the verdict, if the jury gave credit to the testimony of witnesses on behalf of plaintiff, rather than to the testimony of defendants' witnesses touching material facts, viz., the finishing of the well within a reasonable time, the capacity of the well to furnish the required quantity of water, and the reason why the capacity of the well was not tested. Plaintiff, in answer to the question, "When you had finished that well what did you do?" testified: "After we finished, just as the last was taken out in the finishing up of the well, I called for a test of the well." He also testified, on cross-examination, in answer to the question, "Could it be used?" "Yes, sir, it could be used. There was nothing to hinder them. It was clear then when we left it. I finished the well myself, with the aid of a

certain man here. We put the gravel around the pipe to keep the quicksand from coming up;" and to the next question, "All was done and in excellent order?" answered, "Yes, sir." On re-examination, he testified: "When I went to see them about testing the well, after I had finished it, they said they had no time to test the well." He further testified on re-cross: "The well was finished in July; I don't remember the exact date." The testimony of the witness George Barger, also tended to corroborate plaintiff in his statement that the well was finished. The evidence of plaintiff and of the witnesses Dusenbury, Barger and Kaiser was sufficient to justify the jury in finding that the well when finished, was of the capacity and would furnish the supply of water required by the terms of the special contract. Furthermore the evidence established the fact that plaintiff was prevented by defendants from testing the well after it was finished. Hence, if the testing of the well was required by the contract and plaintiff was ready and willing and offered to make the test, but was prevented from making it by the defendants, he was thereby excused from the performance of that requirement. In *Fowler v. Deakman*, 84 Ill. 130, cited by counsel for appellants, by the terms of the contract, a certificate of the architect was required fixing the price of work. The architect was frequently called upon by plaintiff for such final certificate, but after striking out some items and delaying about a year, he declined doing anything further.

The court say in the opinion, the architect unmistakably refused to proceed further even in an effort to adjust the dispute of the parties; this, then, absolved appellee from any further efforts to procure the certificate, and entitled him to sue and recover any amount which might be due and owing him. In the case at bar, the condition that the well should be tested was for the benefit of appellants. If they chose to prevent its performance, they thereby absolved appellee from the duty to perform it. But counsel for appellants insist that the verdict being for \$200, a sum less than the contract price, "and as the special count is for the contract price and not for damages accruing by reason of a breach, the special count

furnishes no basis for this verdict, and we must find, if we can, a basis for it in some of the other counts." Counsel then claims that under the common counts, the evidence does not justify a verdict for \$200, and hence should have been set aside. We do not concur in this view. If the jury were justified in finding from the evidence that appellee had fully performed the special contract for digging the well, then nothing remained to be done under it but for defendants to pay the money due him for the work, and he could rightfully recover under the common counts; and it does not follow that, because the verdict is for a sum less than the price claimed, the jury did not find the contract was fully performed by appellee. Plaintiff might justly complain if the verdict is for less than he was entitled to recover, but if he chose to sustain the loss rather than to have the verdict set aside, and incur the expense and delay of another trial, he had the right to do so, and ought not to be deprived of the benefit of his judgment for the amount of the verdict rendered. Defendants could not be thereby injured. The judgment is a complete bar to any further recovery for any of the causes of action set up in the amended declaration.

It is also said the court erred in permitting plaintiff to introduce the evidence of Frank Kaiser, taken on the former trial, contained in the notes made by Krebs, a court reporter. The death of Kaiser was proved. Krebs then testified he was a court reporter and reported the evidence at the former trial. He identified the transcript of the evidence as that taken by him at former trial, and as the transcript of the evidence of deceased witness at that trial. Counsel for defendant made a *general objection* in the trial court to this evidence, and now in this court for the first time makes the *specific* objections "that the stenographer failed to state that the transcript of the evidence is correct, and that Kaiser testified on the former trial as set forth in the transcript." These specific objections came too late in this court. They should have been made in the court below and an opportunity there have been given to make the necessary proof and obviate any objection. Some other objections are made to the ruling of the court in admit-

ting evidence for plaintiff, but we deem it unnecessary to discuss them. The only other error assigned requiring our attention, is giving plaintiff's first instruction, the only one given on his behalf, except as to the form of verdict: "If the jury believe, from the evidence in this case, that the plaintiff bored and dug a well for the defendants, which would furnish eight barrels of water per day for twenty-four hours, for two days, and that he was to have \$250 for such a well from the defendants, then they will find for the plaintiff, even though they believe the well has not been tested, if they believe from the evidence the failure to test the well was not the fault of the plaintiff." The criticism upon this instruction is, that it ignores the condition "to dig the well *within a reasonable time*," and furthermore, that the last clause announces a proposition which is not the law, because if the test was not made *by reason of an accident*, not attributable to the fault of plaintiff, he would not be excused; hence the instruction should not have been given without qualification. We do not think the instruction was calculated to mislead the jury, or was bad for the second reason suggested.

There was no pretense or claim on the part of plaintiff that aught but the act of defendants prevented the test being made, and there was no evidence on his behalf directing the attention of the jury to any other cause for not testing the well. Nor, in view of the instructions given for defendants, do we feel the jury were misled by omitting from their instruction the conditions mentioned. The court gave four instructions for defendants. The first informs the jury that plaintiff must prove by a preponderance of the evidence that he has bored and dug a well of the capacity to furnish eight barrels of water daily for two days, upon a test thereof, before he can recover under the special count. The second was not a proper instruction without some qualification. The third informed the jury, if no time was specified when the well should be finished, the law is that plaintiff should finish the well *within a reasonable time* from the date contract was made.

We perceive no error requiring the reversal of the judgment and it is affirmed.

Judgment affirmed.

THE ST. LOUIS NATIONAL STOCK YARDS
V.
SILVERE TIBLIER.

Stock Yard Companies—Negligence of—Failure to Properly Care for Stock—Contributory Negligence—Evidence—Instructions—Damages.

1. In an action brought to recover from a stock yard company for injury to stock alleged to have been occasioned through its negligence in leaving the same exposed to stormy weather, this court holds, in view of the evidence, that the plaintiff was not guilty of contributory negligence as to the giving of directions touching the care of the stock; that the jury were warranted in finding that said stock was injured by being exposed to stormy weather over night; that the admission in evidence of testimony as to the conversation of the plaintiff with a yard foreman touching the care of the stock was proper, and declines to interfere with the verdict for the plaintiff.

2. In such cases, the measure of damages is the difference in the market value of such stock when received by the stock yard company and when delivered to the consignor.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of St. Clair County; the Hon. W. H. SNYDER, Judge, presiding.

Appellee shipped from Kansas City to appellant a car load of horses. The horses were intended for the New Orleans market. They reached the stock yards in East St. Louis March 28, 1888, in the evening, over the C. & A. R. R. On that evening, between five and six o'clock, appellee went to the stock yards to look after his horses. He inquired for the superintendent and was told that he had gone home. He then went through the yards and found Mr. White, who was said to be the foreman in charge of the horse department. He informed White that he had a car load of horses coming in over the C. & A., from Kansas City, and that he wanted them taken from the cars to the stables. White told him that the horses would not probably arrive before eight o'clock. Appellee told White that he was informed at Kansas City that the horses would reach the yards about five o'clock. Appel-

lee proposed to wait until the horses arrived, but White said there was no necessity for that; that his horses would be taken care of according to his directions. Appellee had halters with him which he gave to White, who assured him that his instructions, as to the care of the horses, would be carried out. Appellee went to the stables but the foreman in charge was out; but he gave the stable boys some money and told them to take good care of his horses when they reached the stables. The night proved to be a stormy one and the weather was threatening when appellee was at the yards. The horses, when they were brought into the yards, were put into the pens, with sheds attached, and remained there until the next morning, when they were taken to the stables, and were in bad shape, had taken cold and several were sick and would not eat. All of the horses but one were subsequently shipped to New Orleans. Appellee claimed that the horses were damaged \$1,500 and in a trial before a jury he recovered a verdict for \$800, upon which judgment was entered, and the stock yards prosecute this appeal.

Mr. M. MILLARD, for appellant.

Messrs. FRANKLIN A. McCONAUGHY and JOHN D. JOHNSON, for appellee.

REEVES, J. It is urged that because appellee did not go to the superintendent's office and leave his directions as to the care of his horses, that he was guilty of such contributory negligence as will prevent a recovery. The proof shows that he inquired for the superintendent and was told that he had gone home for the day. He then went into the yards and sought out the man who, as he was informed, had charge of the horse department of the yards. He gave his instructions to him and was told that the same would be carried out; and when appellee proposed to wait until the horses arrived and see after them himself, he was told by this man, who appeared to be in charge, that this would not be necessary—that his instructions would be certainly carried out. Under the cir-

cumstances, we think the jury were fairly authorized to find that appellee was without fault in the matter.

It is again urged that the evidence shows that the stock was not injured while in appellant's charge. It is true that the testimony was conflicting on this point, but there was sufficient evidence upon which the jury might well find, that the horses were seriously injured by being left in the pens during the stormy weather of the night after their arrival.

Objection is also made to the admission of testimony as to conversation of appellee with Mr. White, when appellee went to see him about the horses. We think White, under the circumstances shown by the evidence, was such an agent of appellant as authorized appellee to deal with him in regard to the care of his horses when they came into the yards; and, if so, then conversations with him in relation to the matter were properly admissible. The admission of Kennedy's letter, if not proper, plainly did not injuriously affect appellant.

The instruction as to the measure of damages was certainly correct. The measure of damages was the difference in the market value in their condition when they were received by appellant and their market value in the condition they were when delivered to appellee. The objection really is that the evidence did not show their market value when received and when delivered by appellant to appellee. The fair interpretation of the testimony of Eisfelder, taken in connection with the other testimony in the case, is that the difference in the market value of the horses when received by appellant and when delivered by appellant to appellee, was from \$800 to \$1,000.

The second instruction does not assume to give the exact measure of the damages, but is framed to show under what state of facts appellant would be responsible for the damages sustained by appellee. The statement that the third instruction assumes that the horses were in good condition when delivered to appellant, is not supported by the language used as we find it in the record. The fourth instruction correctly states the law, as we have already held, under the facts shown. We think the damages allowed not excessive under the proof in the case. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Osborne & Co. v. Meyerott.

D. M. OSBORNE & Co.

v.

HENRY G. MEYEROTT.

Account—Balance Due—Recovery of.

In an action to recover a balance alleged to be due upon an account, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed February 2, 1891.]

APPEAL from the Circuit Court of Randolph County; the Hon. GEORGE W. WALL, Judge, presiding.

Messrs. R. E. SPRIGG and J. J. MORRISON, for appellants.

Messrs. W. M. SCHUWERK and ALEXANDER HOOD, for appellee.

GREEN, J. Appellee brought this suit to recover balance on account alleged to be due him from appellants. A verdict and judgment for \$192.74 and costs of suit, in favor of plaintiff and against defendants, was entered in the court below, and defendants took this appeal. The only ground for reversal suggested is, that there is no evidence to support the verdict. We can not sustain this contention. An examination of the record satisfies us the finding of the jury was justified by the evidence and we decline to disturb the verdict. The mistake in the footing of the account attached to the declaration, if it be a matter of any importance in the case, we think is explained by the erasure of an item of said account, without any authority shown to erase the same. The amount of this item we ascertain, by examining the account read in evidence, to be \$57.56, charged as commissions. The judgment is affirmed.

Judgment affirmed.

THE CITY OF MT. VERNON

V.

ISAAC B. BROOKS.

Municipal Corporations—Negligence of—Personal Injuries—Cripple—Defective Sidewalk—Municipal Warrants—Issuance of in Anticipation of Collections—Sec. 2, Chap. 146, Starr & C. Ill. Stats.—Evidence—Instructions.

1. Where municipal corporations omit the duty of erecting railings or other guards on the sides of a walk adequate for the protection from danger by falling therefrom, of persons using the walk with ordinary care and caution in walking thereon, it will be sufficient to sustain a verdict for gross negligence.

2. A cripple using crutches has the same right to use a sidewalk as a sound person, but must exercise a higher degree of care.

3. A city assuming to repair a sidewalk must do so in such a manner as to render the same reasonably safe for travel.

4. In view of Sec. 2, Chap. 146a, Starr & C. Ill. Stats., a municipal corporation will not be excused from repairing its sidewalks, there being no funds in its treasury, if a tax levy is already made, against which warrants may be issued in anticipation of its collection by virtue of that section.

5. A witness should not be cross-examined as to matters not touched upon in chief.

6. In cases of this sort it is for the witness to give the facts as to the condition of a given walk and the jury to decide as to its safety.

7. A city is bound to use ordinary care to keep its walks in a reasonably safe condition for persons using ordinary care and with the ordinary capacity to care for themselves.

[Opinion filed February 26, 1891.]

APPEAL from the Circuit Court of Jefferson County; the Hon. C. S. CONGER, Judge, presiding.

Messrs. POLLOCK & POLLOCK, for appellant.

A party can not expose himself to danger and then recover damages for an injury he might have avoided by the use of reasonable precaution. *Lovenguth v. Bloomington*, 71 Ill. 238; *City of Quincy v. Barker*, 81 Ill. 300.

It is the duty of a person to use his eyes to direct his footsteps, and failing to do so is such negligence as will preclude from recovering. *Kewance v. Depew*, 80 Ill. 119.

39	426
59	88

39	426
112	419

The burden of proof was on the plaintiff to establish the fact that, in view of his knowledge of the condition of the walk as he claimed it to be, and his own crippled condition, he exercised such precaution to avoid injury as a prudent man would, but no such evidence of this kind can be found in the record. The mere fact that he was injured affords no ground for recovery where danger is actually known or apparent to ordinary observation, or reasonably to be apprehended; proof of positive or special care must be made to warrant a recovery. *C., B. & Q. R. R. Co. v. Olsen*, 12 Ill. App. 245, 251.

If the defendant contributed to the injury no recovery can be had. *Chicago & Alton R. R. v. Fietsam*, 123 Ill. 518.

The fact, if proven, that the defendant may have been guilty of gross negligence, will not entitle the plaintiff to recover. Care on the part of the plaintiff is essential and must be proven. *Willard v. Swansen*, 126 Ill. 381.

The plaintiff must show that he used due care and that the injury was in no way attributable to him. *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416.

A plaintiff who by his own want of ordinary care has contributed to the injury complained of, can not recover no matter what the degree of the defendant's neglect may have been, provided it is short of that which raises an inference of a wilful and intentional wrong, and the doctrine of comparative negligence does not apply in such case. *C., B. & Q. R. R. v. Dougherty*, 12 Ill. App. 181.

No person was present with the plaintiff at the time of the accident, and hence we can not have any further explanation of the circumstances attending his fall. Courts can not draw inferences or indulge in presumptions beyond the testimony to sustain a verdict. The burden of proof of every fact necessary to a recovery was on the plaintiff, and under the law as stated in the foregoing cases, the evidence fails to show any right of recovery, and the trial court should have set the verdict of the jury aside upon this ground.

The rule is, where a person by the exercise of proper care could have avoided the injury, no recovery can be had. *Wood's Mayne*, 108.

There is no evidence in the entire record showing that any other defect that may have been in the walk contributed in any way to producing the alleged injury, except the board which was partially broken at one end, as stated by the plaintiff. And to this alone, as we understand the rule of law, the inquiry should have been directed. The evidence shows that the piece of walk spoken of by the plaintiff and referred to by some other of the witnesses, was about eight feet in length, and although other parts of the sidewalk may have been in an unsafe condition, no recovery can be sustained because of any such defects until some one has suffered personal injury therefrom. If we are supported in this position then but little of the plaintiff's testimony has any bearing upon the question in issue, and fails to support the finding of the jury.

The plaintiff's witnesses make general statements by referring to the condition of that piece of sidewalk after the cyclone on the 19th day of February, 1888, when a caboose was thrown upon it, breaking it down, and that it remained in about the same condition till a new walk was built there after this accident happened. But as to when this board was partially broken, that the plaintiff claims caused him to fall, there is no evidence, except so far as the statement of the plaintiff may tend that way, when he says that he knew about it for some time before that.

Whatever may have been the condition of the sidewalk in question, if the city made reasonable efforts to keep it in reasonably safe condition, the defendant is not liable. *Chicago v. McGiven*, 78 Ill. 347; *Rockford v. Hildebrand*, 61 Ill. 155; *City of Quincy v. Barker*, 81 Ill. 300.

The evidence for the defendant shows clearly that this walk was totally destroyed by the cyclone of the 19th of February, 1888; that within a short time afterward the walk was rebuilt in the best way it could be done under the circumstances; that continued inspection was made of all the walks and that neither of the officers of the city had any notice of any defect in it until after the happening of this accident, when it was immediately repaired.

Mr. SAMUEL LAIRD, for appellee.

On every question of fact presented to the jury in the case it can not fail to be seen on the most superficial examination of the record that the preponderance of the evidence is with appellee. Appellant cites *Smith v. Slocum*, 62 Ill. 354; *Ehrich v. White*, 74 Ill. 481; *Belden v. Innis*, 84 Ill. 78; *Ten-tonia Life Ins. Co. v. Beck*, 74 Ill. 165; *Ferkel v. The People*, 16 Ill. App. 310-315, and *Cochlin v. The People*, 93 Ill. 410. None of which authorities are in any way applicable to this case, in our opinion.

The doctrine of the law is laid down by our Supreme Court in a long and unbroken line of decisions, and in fact it is now the settled law of the State, that juries and trial courts who heard the witnesses testify and observed their demeanor on the stand are the best judges of their credibility, and that courts of appeal will not interfere with their conclusions unless the verdict is wholly unsupported by the evidence. *White v. Claves*, 32 Ill. 325; *Ferry Co. v. Higgins*, 72 Ill. 517; *Calvert v. Carpenter*, 96 Ill. 63; *Hays v. Houston*, 86 Ill. 487; *Lewis v. Lewis*, 92 Ill. 237; *Kinsley v. Sampson*, 100 Ill. 573.

PHILLIPS, J. This is an action on the case brought by appellee against appellant to recover for personal injuries received while passing along a sidewalk in the city of Mt. Vernon, which is alleged to have been defective. It is alleged that on the 25th day of January A. D. 1889, a sidewalk was built over a ravine, the bottom of which was about four feet below the level of the walk, and which walk was only three feet wide, constructed of plank laid on stringers resting on the banks of the ravine, and which was without railing along the sides of the walk at that point, and with one side sagged about six inches lower than the other, with loose and broken plank laid on the stringers, and that the walk at that point and both ways therefrom was unsafe and insecure by reason of holes in the walk and loose plank thereon. It is further alleged that the plaintiff, while using due care passing along said walk, stepped into a hole in the sidewalk and fell from the walk into the ravine, and received severe inju-

ries. At the bottom of the ravine were broken brick on which he fell. This walk was on a street much used and was the direct route for appellee to pass in going to and from his residence to his place of business.

The defendant pleaded the general issue and a special plea, in which it was averred that prior to plaintiff's injury the sidewalk in Mt. Vernon had been destroyed by a cyclone and the defendant had been compelled to exhaust and expend all the revenue applicable to building and repairing sidewalks before such injury. The evidence shows the plaintiff is crippled and requires the use of crutches to enable him to move on the walks, and the only sidewalk over which he could pass from his place of business to his home was this walk; that it was out of repair with broken and loose boards and from the cause and in the manner alleged, the plaintiff fell and was injured. The sidewalk where it rested on stringers across the ravine from bank to bank was about eight or nine feet long and no railings were along the sides of the walk and none were placed there at the time of its construction. It has been held in repeated decisions of the Supreme and Appellate Courts of this State that where municipal corporations omit the duty of erecting railings or other guards on the sides of a walk adequate for the protection from danger by falling therefrom, of persons using the walk with ordinary care and caution in walking thereon, it will be sufficient to sustain a verdict for gross negligence. *Joliet v. Verley*, 35 Ill. 58; *Chicago v. Gallagher*, 44 Ill. 295; *Springfield v. LeClare*, 49 Ill. 476; *Sterling v. Thomas*, 60 Ill. 264; *Galesburg v. Higley*, 61 Ill. 287; *Chicago v. Langlass*, 66 Ill. 361; *Monmouth v. Sullivan*, 8 Ill. App. 55; *Carterville v. Cook*, 29 Ill. App. 495. The appellee, though crippled and necessarily using crutches to pass along the walk, had the same right to use it as one not in his condition. The only requirement of the law being that he should use a higher degree of care consequent on his greater liability to danger in passing thereon. The evidence authorized the jury to find that a sufficient degree of care was used by the appellee, and it was so found. The evidence shows that the sidewalks of the city had been destroyed by a cyclone

previous to the time of appellee's injury and that this walk had been destroyed with others.

But it also appears that the appellant repaired the walk at this place, and the manner of repair was such that it was left in an unsafe condition, without railing, where the walk bridged the ravine. If the city assumed to repair the walk, its duty was to so repair that it would be reasonably safe for persons to travel over the same. This it failed to do. It is insisted, however, that the city had expended all its revenue levied for the building and repairing of sidewalks, and therefore was without money to keep the same in repair, and was discharged from its duty thereby. The testimony of the city treasurer is that there was no money in the treasury from November 20, 1888, to April, 1889. The appellee was injured on the 23d day of January, 1889, and the tax levy for 1889 had been made but was not collected until April, 1889. By Sec. 2, Chap. 146, Starr & C. Ill. Stats., municipal corporations may issue warrants to the extent of seventy-five per cent of levy already made in anticipation of their collection. The city, therefore, having the right to issue its warrants in anticipation of its levy then made, had means to provide for the repair of its sidewalk. There is not sufficient evidence in the record of want of funds to repair the walks to discharge the city from its duty of keeping the same in repair. The appellant assigns as error the ruling of the court in overruling and sustaining objections to certain questions. Daniel Smith, a witness for appellee, was asked: "At that time what was the general traveled route for foot passengers down that street?" to which appellant, by its counsel, objected, and the objection being overruled that ruling is assigned as error. It was material to show the use of the walk as one method of determining the knowledge the officers of the city had, or by the exercise of ordinary diligence might have had, of the defects in the walk. But the question was not answered by the witness and could not have affected the verdict. Objection is, however, taken to the language of the court in passing on this objection. The ruling of the court embraced more than was included in the question, but it is apparent that the language used could not

have prejudiced appellant. William Muir, a witness for appellee, stated he saw plaintiff fall, went to his assistance, etc. He was not asked in chief as to the condition of the walk. On cross-examination he stated he was in the habit of crossing that walk, and was by appellant's counsel then asked: "Do you know whether there were any broken planks at that time?" to which appellee, by his counsel, objected, and the objection being sustained appellant excepted. The witness was not asked in chief as to the condition of the sidewalk and the question was not therefore proper as a cross-examination.

Appellant offered as a witness one Thomas Jones, who stated he had repaired the walk about the time of the injury, and was asked: "What condition did you find it in at that time?" which question was objected to and the objection sustained and appellant excepted. The witness, on further examination in chief, stated the time he was at the walk to repair it and the condition in which he found it at that time; appellant had the full benefit of the evidence sought by the question to which the objection was sustained. The witness was then asked in chief, "State whether in your judgment that walk was in a condition for people with ordinary legs to walk over?" to which an objection of appellee was sustained and appellant excepted. It is for the witness to give facts to the jury, and whether the walk was reasonably safe for persons to pass along is a question for the jury to determine from the evidence. This question asks for the opinion of the witness as to the safety of the walk, and the objection was properly sustained. The appellant asked the court to give the following instructions among others: "And you are further instructed for the defendant, that you can not justly visit the misfortunes of the plaintiff upon the defendant, and if you believe from a preponderance of the evidence that the plaintiff was a cripple and used crutches to aid him in passing along the sidewalk, and that from this fact resulted the injury, or that this materially contributed to producing the injury, then the plaintiff can not recover." "You are further instructed for the defendant if, from a careful consideration of all the evidence given to you upon the trial of this cause, you believe

City of Mt. Vernon v. Brooks.

that the cause of the injury complained of can as well be attributed to the want of due care on the part of the plaintiff, or to the fact of his being in a crippled condition and using crutches to assist him in walking, as to any negligence on the part of the servants of the defendant, or if the carelessness of the plaintiff or his crippled condition materially contributed to or was nearly equal to the negligence of the servants of the defendant in causing the injury complained of, then the defendant can not recover," which were refused by the court, and which refusal is assigned as error.

The first instruction above ignores the question as to whether the sidewalk was reasonably safe for persons to pass along the same, and if unsafe for persons having the use of their limbs, the fact that appellee was a cripple would not defeat his right of recovery if he used care proportionate to his condition; however that may be the court gave to the jury the following instruction: "The court instructs the jury that it is not the duty of the city in the construction and repair of its sidewalks to provide against injury to a person in a crippled condition any further than for persons having the ordinary use of their physical powers; all it is required to do is to use ordinary care to keep the walks in a reasonably safe condition for persons using ordinary care, and with the ordinary capacity to care for themselves, and in that case if you believe from the evidence that plaintiff is a cripple and walks with crutches and is thereby less able to care for and protect himself than persons having the ordinary use of their physical power, he would be required to take such additional care and precaution as his condition reasonably requires," which correctly stated the law to the jury, and it was not error to refuse appellant's instructions. The judgment must be affirmed.

Judgment affirmed.

WILLIAM DEERING & Co.
V.
LEROY WASHBURN, SHERIFF.

Chattel Mortgages—Sale of Mortgaged Goods for Benefit of Mortgagee and with His Consent—Fraud—Replevin.

1. Where it is agreed between the mortgagor and mortgagee in a chattel mortgage at the time the same is made, that the mortgagor may sell at retail in the usual course of business and at its market value any of the property covered, the entire proceeds of such sales to be turned over to the mortgagee and the amount credited on the indebtedness to secure which the mortgage was given, such understanding or agreement renders the mortgage fraudulent in law and void as to creditors.

2. The contrary seems to be the case when the agreement is made *subsequent* to the giving of the mortgage.

[Opinion filed February 26, 1891.]

APPEAL from the Circuit Court of Fayette County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

The action is replevin brought by appellant to recover some cultivators, plows, wagons and corn-planters from appellee, the sheriff of the county, who had levied upon the chattels by virtue of an execution in favor of Walter A. Wood Mowing & Reaping Company against one R. H. Miller. The case was tried upon an agreed statement of facts, which is as follows: That on the first day of February, 1889, one R. H. Miller, of Vandalia, in this county, was indebted to plaintiff in the principal sum of \$1,498.26, with interest, evidenced by his note, payable to plaintiff, dated January 30, 1888, due October 1, 1888, drawing eight per cent interest per annum from date, on which note nothing had been paid. That on said 1st day of February, 1889, the plaintiff, for a valuable consideration, agreed with said R. H. Miller to, and did on that day extend the time of payment of said note to October 1, 1889. That on said 1st day of February, 1889, the said R. H. Miller executed, acknowledged and delivered in proper form

a chattel mortgage to plaintiff to secure the payment of said note and interest, which chattel mortgage was on February 1, 1889, duly entered on justice peace docket in the township where said Miller resided, and filed for record and recorded in book 76, at page 416 of records, in this county. That the property described in said chattel mortgage included all the property in controversy, together with some other property. That at the time said chattel mortgage was made, and during the summer of 1889, and up to September 27, 1889, said Miller was engaged in selling hardware and agricultural implements at retail, and by virtue of an understanding entered into between said Miller and plaintiff at the time of executing and delivering said chattel mortgage, said Miller sold a portion of the property described in the chattel mortgage at retail in his usual course of business and at its market value, and the entire proceeds of such sales made by said Miller, amounting to \$425, were turned over to plaintiff by Miller in full of proceeds of sales, on November 14, 1889, and were on that day duly credited by plaintiff on said Miller's note, secured by said chattel mortgage. That at the time of making said chattel mortgage, and understanding that Miller might sell a portion of said property, it was further agreed between plaintiff and said Miller, that said Miller should have no beneficial interest in such proceeds, except the right to have them credited on said note, and should retain no portion of such proceeds whatever, but should make such sales with the consent of plaintiff and for plaintiff's sole and exclusive benefit, except that the proceeds were to be credited on said Miller's note; and that said Miller did surrender to plaintiff the entire proceeds of said sales, and retained no portion whatever, and plaintiff gave said Miller credit on said note for the full amount of said sales. That at the time of giving said chattel mortgage the property was in said Miller's warehouse at Vandalia, Illinois, with other property Miller had for sale in his regular business (which warehouse was separate and distinct from Miller's salesroom and some two blocks distant therefrom), and remained until this replevin was brought, except such portion as was sold by Miller, and the portion sold by Miller remained in said ware-

house until sold. That on the 27th day of September, 1889, the Walter A. Wood Mowing & Reaping Machine Company obtained a judgment in the Circuit Court in this county against said Miller for \$3,547. That on September 27, 1889, an execution was issued on said judgment, and on the same day said execution was placed in the hands of the defendant, who was then and there sheriff of said county, to execute, and the defendant on said September 27, 1889, before plaintiff's chattel mortgage was due, indorsed on said execution a levy of the property described in plaintiff's declaration, and other property in the same warehouse, but did not remove the same to any other building, but locked it up in the same building and retained possession of the key to the building. That on the 30th day of September, 1889, before plaintiff's chattel mortgage was due, it demanded of the defendant the possession of the property mentioned in the plaintiff's declaration, and the defendant refused to deliver the possession thereof.

Either party shall have the right to introduce at the trial the note and record of said chattel mortgage, to be considered in connection with the foregoing facts, and in addition thereto, without making proof of the loss of the original mortgage.

The note and the record of the chattel mortgage were introduced in evidence by appellant, the plaintiff below. The Circuit Court found for the defendant, and the plaintiff brings the case to this court by appeal.

Messrs. COX & WILLS for appellant.

Messrs. JOHN A. BINGHAM and WOOD DROS., for appellee.

REEVES, J. The contention of the appellant is clearly stated in this language: "An agreement in or outside a chattel mortgage, whereby the mortgagee authorizes the mortgagor to sell a portion of the property covered by the chattel mortgage, for the sole and exclusive benefit of the mortgagee in payment of the debt secured, the mortgagor to have no beneficial interest in the proceeds of sale, does not vitiate the mortgage *per se*, as between mortgagee and third parties, but

Deering & Co. v. Washburn.

if entered into in good faith and honestly carried out, will be upheld." The case of *Goodheart v. Johnson*, 88 Ill. 58, is cited in support of the proposition submitted. It must be conceded that on first reading, the opinion in this case seems to support the proposition of appellant. However, it will be noted that the permission given by the mortgagee to the mortgagor to sell a portion of the mortgaged property, and turn over the proceeds to the mortgagee, was not given at the time the mortgage was made. Hence, the mortgage when made was a valid one. The court held that the subsequent arrangement by which consent was given by the mortgagee to the mortgagor to sell the property at public or private sale, the proceeds of such sale to go to the mortgagee, did not make the mortgage fraudulent in law and void as to creditors. The fact of such consent taken in connection with the sales made in pursuance of such consent, the court say, might rightfully be considered in determining the question whether the mortgage was originally made to hinder and delay creditors. In this case it was agreed that at the time the chattel mortgage was made, there was an understanding by which Miller was to sell at retail in the usual course of business and at its market value any of the property mortgaged, the entire proceeds of such sales to be turned over to the mortgagee and the amount credited on the indebtedness to secure which the mortgage was given.

As we understand the decisions of our Supreme Court, such an understanding or agreement entered into at the time the mortgage is made renders the mortgage fraudulent in law and void as to creditors. *Davis v. Ransom*, 18 Ill. 396; *Barnet v. Fergus*, 51 Ill. 354; *Dunning v. Mead*, 90 Ill. 376; *Greenebaum v. Wheeler*, 90 Ill. 296; *Huschle v. Morris*, 131 Ill. 587. The exhaustive argument furnished us by appellant's counsel, urges with much force and reason in favor of sustaining the validity of the mortgage in question, fortified by the decisions of the courts of last resort of other States; but in the face of the decisions of the Supreme Court of this State we feel compelled to hold that the decision of the question by the Circuit Court was correct. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

F. E. MINTER

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Contempt—Refusal to Testify before Grand Jury—Crimination of Self.

1. To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see from the nature and circumstances of the evidence which the witness is asked to give, that there is reason to apprehend injury if he is compelled to answer, and where that is made to appear, much latitude will be allowed him in determining the effect of any particular question. The danger to be apprehended must be real and not imaginary.

2. The law will not permit a man to keep the names of those who violate the law, and their offenses, secret, because of a fear that they might give evidence in their turn against him.

3. Testimony going to show that the witness giving it had seen a certain person play cards for money, does not furnish or tend to furnish evidence against such witness of a criminating character, nor will the fact that the witness was engaged in the game, excuse him from answering.

[Opinion filed February 26, 1891.]

IN ERROR to the Circuit Court of Gallatin County; the Hon. C. C. Boggs, Judge, presiding.

The plaintiff in error was a witness before the grand jury and answered that he knew of cards being played for money in Gallatin county within eighteen months last past, and was then asked by the foreman, "Who did you see playing?" which question he refused to answer, whereupon he was brought before the court and admitted the facts as above. The court then ruled and stated to him that he was not required to give evidence against himself, nor to give evidence that would tend to criminate himself, but that he was required to answer whether or not he had seen any person other than himself play at cards for money; that he might lawfully refuse to tell anything that he himself had done, but that he could not lawfully refuse to tell what he had seen another person do. Plaintiff in error then asked if the court held that a witness before a grand jury was required to tell

Minter v. The People.

that he had seen others gaming for money if the witness was also playing at the same time and in the same game with such other persons, and the court thereupon ruled that under such circumstances the witness was bound to tell that the others had played, but that he (plaintiff in error) might lawfully refuse to tell anything that he himself had done or said, or anything that tended to criminate himself, but that he must tell if he had seen others play; that the fear that his answer might induce the other parties to testify against him in retaliation, or that the grand jury might summon the others and force them to tell, was not a lawful reason for refusing to answer the question. To which holding and ruling of the court the plaintiff in error excepted then and there. The court then inquired of plaintiff in error if he would, under such holding and ruling, if returned to the grand jury room, answer the question asked him by the foreman, and plaintiff in error said he would not answer it under such rulings. Whereupon the court adjudged plaintiff in error guilty of contempt, and assessed a fine against him of \$25 and costs as a punishment for such contempt, to all of which plaintiff in error then and there excepted.

Messrs. PILLOW & MILLSBACH, for plaintiff in error.

No appearance for defendants in error.

PHILLIPS, P. J. To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see from the nature and circumstances of the evidence which the witness is asked to give, that there is reason to apprehend injury if he is compelled to answer, and where that is made to appear, much latitude will be allowed him in determining the effect of any particular question. The danger to be apprehended must be real and not imaginary. The witness himself is not the sole judge whether his evidence will bring him into danger. The judge must see and determine from the circumstances of the case, and the nature of the evidence, whether there is reasonable ground to appre-

hend danger. The witness was by the judge told that he need not answer any question as to what he had done or said, that tended to criminate him, but he must tell if he had seen others play at cards for money, and this, the witness said he would not answer. Can it be pretended that, if his answer had been he had seen "A" play at a game for money, that it furnishes, or tends to furnish, evidence against himself? Under that, evidence that "A" was guilty of playing a game of cards for money would be shown without necessarily proving who was in the game with "A." And the answer could not tend to criminate the witness or furnish a link in a chain of circumstances to make a case against the witness. Nor would the fact if the witness was engaged in the game at the same time excuse him from answering; nor that he might fear "A" might be called to testify against him be an excuse for refusing to answer the question.

The law will not permit a man to keep the names of those who violate the law, and their offenses, secret, because of a fear that they might give evidence in their turn against him. To admit such a rule would make such protection to those engaged in gaming, that all who entered a gaming house and played, could be protected by a claim of privilege on the part of others engaged in playing and make that privilege an inducement to those present to engage in gambling and thereby encourage gambling and thus defeat prosecutions for a violation of the statute by engaging in the game. While the question originally asked by the foreman should have had added to it some such term as, "not naming or including yourself," yet when brought before the court and fully and correctly informed as to his rights, which, under the ruling were protected, he still declared that he would not answer the question, under such declaration and refusal to answer he was in contempt of court. *Ward v. The State*, 2 Mo. 98, and *Smith v. The People*, 20 Ill. App. 591. The judgment is affirmed.

Judgment affirmed.

THE EUGENE ROBINSON FLOATING MUSEUM COMPANY
v.
PETER HAUPTMANN.

Contracts—For Use of Boat—Recovery for.

In an action brought to recover upon a contract touching the use of a certain boat, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed June 9, 1891.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. ANDREW M. SULLIVAN and MARSHALL F. McDONALD, for appellant.

Mr. E. L. THOMAS and R. W. ROPIEQUET, for appellee.

REEVES, J. It is urged that the evidence in the cause was not sufficient to justify the verdict. We have carefully examined the evidence and find that while it was conflicting there was sufficient, if the jury gave credit to the witnesses for the plaintiff below, to support the verdict. Complaint is also made that the trial court refused proper instructions asked by appellant, the defendant below. There was testimony *pro* and *con*, on the question as to whether the boat to recover for the use of which this suit was brought, was in good and complete running order when delivered to appellant as the contract of hiring required it should be. In whatever condition it was the appellant accepted and used it, as the evidence clearly shows. Under this state of facts we think instructions numbered one to five inclusive, were properly refused. All the law of the case, in view of all the evidence in the case, was embraced in appellant's given instructions. Instruction number six was misleading. The plaintiff's evidence was that at Memphis there was talk about appellant

not using the boat any longer but that finally it determined to continue the use of the boat, and appellee testified its further use was to be under the original agreement. This appellant denied, but if the jury believed appellee, he was plainly entitled to recover for such further use under the original agreement. Instruction number seven was faulty because it excluded from the consideration of the jury the question whether the damage spoken of was or was not the result of the negligence of the appellant's servants.

Instruction number eight was properly refused, as it referred to instructions which had been, and, as we think, properly refused. The instructions given for appellant state the law for appellant fairly and as fully as it should have been given to the jury. We perceive no error in the instructions given for appellee. The objection that is urged, that one witness was permitted to use a memorandum in giving his testimony, we do not regard as well founded. Under the facts disclosed, as we find them in the record, we do not think there was any error in permitting the witness to use the memorandum for the purpose which he did use it. It is also urged that the trial court erred in not sustaining the motion to quash the writ of attachment. It is a sufficient answer to this to say that after the writ of attachment was served, appellant entered into a forthcoming bond and thereby obtained possession of the property attached. The amount of the verdict was less than the testimony would have warranted. Finding no error in the record, which should reverse the judgment, the same is affirmed.

Judgment affirmed.

THE ST. LOUIS, ALTON & TERRE HAUTE RAILROAD
COMPANY

v.

JOHN R. RUSSELL.

Railroads—Negligence of—Injury to Stock—Crossings—Signals.

1. A railway engineer seeing domestic animals grazing near a crossing, is not bound for that reason to stop or slow his train.

2. It is the duty of such engineer to slow or stop his train when such stock is on the crossing, or in such proximity thereto that a collision may be expected.

3. The engineer must, in such cases, use reasonable care and diligence in the management of his train to prevent injury to stock.

4. An instruction should not define particular acts in a given case as negligence.

[Opinion filed June 9, 1891.]

APPEAL from the Circuit Court of Williamson County;
the Hon. R. W. McCARTNEY, Judge, presiding.

Messrs. CLEMENS & WARDER, for appellant.

Messrs. DUNCAN & RHEA, for appellee.

PHILLIPS, P. J. This was an action on the case brought by appellee against appellant for killing stock at a public road crossing by appellant's locomotive. The appellee claims there was negligence in the management of the train by appellant's employes. The evidence shows several head of animals were grazing along the side of the public highway at a distance of about forty yards from where the railroad crosses the same, and as the train approached the crossing, the animals started to run across the track, and one that was grazing farthest from the crossing was struck and killed at the crossing. The negligence claimed to exist was, that the animals, where grazing, could be seen from the locomotive for a distance of about three hundred and ninety-one yards, and it is further

claimed that the statutory signals were not given and that no whistle was sounded until within about three hundred yards of the crossing. The public highway runs east and west, and the railroad runs diagonally across the same. Three witnesses swear the bell was rung as required, while one swears he did not hear the bell. But one witness testified from observation to the circumstances of the killing of the horse. He was at his house, several hundred yards away, and saw several head of animals grazing about forty yards west of the crossing, and when the train whistled, the animals started to run along the public highway.

The train was running at a high rate of speed, and as testified to by the engineer, was running nearly thirty miles an hour when the animal was struck. The negligence claimed, is in failing to see the animal. The engineer testifies that he did not see the animal that was struck until it came on the road in front of the train, at almost the moment it was struck. The fireman says that as the animal came running across he said to the engineer, "Look out," and the animal jumped on the track in front of the train; but had the engineer seen the animal coming down the lane, that fact would not have required him, in the exercise of proper care, to stop or slow the train. It would not have furnished any reason to suppose the animal would continue to come on and attempt to cross the track immediately in front of the train. In relation to the signals, the train hands were positive they were given; the plaintiff's witnesses did not hear them. While that was a question for the jury, yet how could it be said that if the whistle had been sounded a quarter of a mile away, or if the bell had been rung at a point a quarter of a mile distant and kept ringing continuously up to the crossing, that it would have prevented the accident? There is no evidence in the record to show that it could have in any manner prevented it, and when the train emerged from the cut approaching the crossing, a distance of three hundred or four hundred yards, the noise of the train startling the animals, does not afford a conclusion that if the bell had been rung and kept ringing a quarter of a mile beyond

the point, that it would have prevented the accident. The fourth instruction asked by the appellee was, that if the animal was killed by a passing train of cars, and before it was killed it was in view of the engineer and fireman of the train, and that it was seen or could have been seen by them with the use of ordinary care and attention, in time to have slackened the speed of the train and avoided the accident, and that no efforts were made by them in that direction, then this was such negligence as rendered the company liable. This instruction omits a material question. The law does not require a train to be stopped or slackened because an animal may be in plain sight from the engine as it grazes on the highway fifty or sixty yards from the railroad crossing. It must be on the crossing or in such proximity thereto that a collision may reasonably be expected by those in charge of the train, unless the train be slackened or stopped. The fifth instruction asked by the appellee is, that if the jury believe from the evidence that the plaintiff's mule was killed by the engine or train of the defendant while on the crossing, and that the persons in charge of the train or engine could have seen the mule on the track, or in dangerous proximity thereto, in season to have stopped or slackened the speed of the train, and prevented the injury, and did not see said mule, or seeing it in season to have avoided the injury did not do so, then they would be guilty of such negligence, for which the company would be liable. The engineer in charge of the engine is required to use reasonable care and diligence in the management of the train to prevent injury to stock, and this is the extent to which the requirement goes; but as presented by this instruction, the question of reasonable care and diligence is omitted, and the liability placed on the grounds of it being possible to see the mule and not whether, in the exercise of reasonable care and diligence, it could have been seen. The instructions are further erroneous in defining the particular acts as being negligence. The fourth and fifth instructions are erroneous in these particulars, and the judgment must be reversed and the cause remanded.

Reversed and remanded.

MILLARD N. CORN
v.
BOARD OF EDUCATION.

Schools—Salary of Teacher—Action to Recover—Destruction of School House—Tornado.

1. Neither party to a contract entered into between a school board and teacher, whereby the latter is employed to teach a certain school upon a salary named, is discharged from observing the conditions thereof by reason of the destruction of the school house, in the absence of any provision therein touching such possible occurrence.

2. The inability of the school board to procure another building for school purposes would not in such case, in the absence of such provision, absolve it from a liability for salary.

[Opinion filed June 9, 1891.]

IN ERROR to the Circuit Court of Jefferson County; the Hon. W. C. JONES, Judge, presiding.

An action of assumpsit was brought by plaintiff against defendant in error in the Circuit Court of Jefferson County, on a written contract, viz.: "This indenture witnesseth that Millard N. Corn, party of the first part, agrees to teach seventh grade in east end building in public schools of Mt. Vernon, Illinois, known as District No. 1, Town 2, Range 3, east of the Third Principal Meridian, in accordance with the following stipulations: First, he will faithfully discharge his duty as a teacher under the guidance and direction of the superintendent, and in accordance with the adopted regulations of the board and the law of the State of Illinois; second, he will attend Jefferson County, Illinois, Teachers' Institute at least four days, if held in the fall before the opening of school or during winter holidays, unless excused by the resolution of the board; third, he will attend the meetings of the Jefferson County, Illinois, Teachers' Association at least once each month if the meetings occur on Saturday and during the months when school is in session, or will otherwise attend upon

special instruction of equal import by the superintendent at least once each month, unless excused by the superintendent; fourth, he hereby affirms that he holds a valid teacher's certificate of the second grade covering the time for which he is engaged to teach under this contract; fifth, he agrees to perform said services for four consecutive months, beginning January 19, 1888, and excluding such vacation as the board may see fit to interpose; sixth, he agrees to perform said services as above specified for the sum of \$45 per legal school month; seventh, he furthermore agrees to the additional stipulation made below by the board as the party of the second part:

"We, the Board of Education of Mt. Vernon, Illinois, known as District No. 1, Town 2 (two), Range 3 (three), east of the Third Principal Meridian, party of the second part, do hereby covenant and agree to employ said party of the first part as a teacher in the school above specified and under the conditions as above stipulated by said party of the first part, and according to the following additional stipulations: first, we agree to pay to Millard N. Corn on discharge of duties as above specified, a salary of \$45 per legal school month; second, we agree to deduct a proportionate amount of said salary for every day's absence from duty, unless otherwise ordered by resolution of the board; third, we agree to deduct from said salary an amount equal to one day's pay for every four cases of tardiness made by said party of the first part as tardiness on the part of teachers is defined per our adopted regulations; fourth, we agree in consideration of item two, as stipulated by said party of the first part, to allow at least an equal number of days as vacation between Christmas and New Year without a deduction of salary; fifth, we agree on evidence of the discharge of duties as above specified, and on presentation of a schedule as required by law, to issue an order on the treasurer of Mt. Vernon township, for the amount due said party of the first part, at the end of each school month; sixth, we reserve the right to discharge said party of the first part on proof of incompetence, gross neglect of duty, or for any other cause which may seem sufficient to us as empowered by the law of the State of Illinois. Signed this 16th day of January, 1888, at the city of Mt. Vernon, Illinois.

MILLARD N. CORN, party of the first part.

JAMES M. PACE, President.

MICHAEL BURGESS, Secretary of the Board of Education, party of the second part."

To that declaration defendant pleaded general issue and a special plea, which avers that after the making of said contract mentioned in the declaration, to wit, on February 19, 1888, the defendant was prevented from carrying out, complying with and completing said contract, by an act of God or visitation of Providence, to wit, by the destruction of its school building, in which plaintiff was employed to teach school, by a tornado, of which plaintiff had notice, and defendant avers that then and there said contract was then and there voided and annulled; and defendant avers that after the destruction of its said building it endeavored to procure other suitable and sufficient buildings in which to teach or have taught the schools of said district, but was unsuccessful, of which plaintiff then and there had notice, and this the defendant is ready to verify. A demurrer was interposed to the special plea, which was overruled, and issue joined on both pleas. A jury was waived by the court and a verdict for defendant and judgment against plaintiff for costs. Plaintiff assigns as error that the verdict was against the law and the evidence and the court erred in overruling the motion for a new trial and in entering judgment against the plaintiff for costs.

MESSRS. WEBB & WEBB and WILLIAM H. GREEN, for plaintiff in error.

All that plaintiff in error was required to aver and prove was the contract, the possession of a teacher's certificate of the second grade, the failure of the board of education to furnish a room, or house, and his readiness and willingness to teach. *School Directors v. Reddick*, 77 Ill. 628.

The contract entered into between plaintiff in error and defendant in error was an absolute one, only conditional as to a few minor requirements, and with these he strictly complied, and no question of their performance was raised at the trial below. By their contract, defendant in error agreed to

employ the plaintiff in error to teach school for a period of four months at a salary of \$45 per month. It was a contract to do a thing possible in itself, without condition, and the promisor is liable for the breach thereof, even though it was beyond their power to perform it, for by their unconditional contract they ran the risk of undertaking to perform it, when they might have provided against it by contract. *Walker v. Tucker*, 70 Ill. 543; *Chitty on Cont.* (5th Am. Ed.) 1070, and note x; *Paradine v. Jaine*, Aleyn, 27; *Parsons on Cont.*, 5th Ed., Vol. 1, page 556, note n.

Where an unconditional contract is made, the promisor must be the one to suffer for a breach of it, if he fails to embrace the opportunity when making it, to provide against it. *Id.*; *School Trustees v. Bennett*, 3 Dutch. 513.

In the case of *Steele et al. v. Buck et al.*, 61 Ill. 344, the Supreme Court, after an exhaustive review of the authorities, both American and English, held that where a contract is entered into by parties wherein they covenant to do or perform certain things, the contract is binding and absolute, unless the parties by their contract provide an excuse in case of destruction of the property; that if the loss occurs, the law will let it rest upon the party who has contracted that he will bear it. *Bacon et al. v. Cobb et al.*, 45 Ill. 47; *Mill Dam Foundry v. Hovey*, 21 Pick. 441; *Demott v. Jones*, 2 Wallace, 1; *School Trustees v. Bennett*, 3 Dutch. 518; *Bullock v. Dommitt*, 6 Term. 650; *Brennocks v. Pritchard*, 6 Term. 750; 3 Bos. & Pul. 420.

Mr. ALBERT WATSON, for defendant in error.

Plaintiff in error demurred to the special plea but did not elect to stand by his demurrer; hence it is conceded that the dispensation of Providence is a release of the defendant's liability under the contract. But in this court by his brief he seeks again to raise the same law question, which we think he can not do. His demurrer was waived by pleading over. *I. & St. L. R. R. Co. v. Morgenstern*, 106 Ill. 216; *McLaughlin v. People*, 17 Ill. App. 306; *Barnes v. Brookman*, 107 Ill. 317; *Walker v. Welch*, 14 Ill. 277.

No propositions of law were submitted to the trial court, and this furnishes another reason why the law question mentioned will not be considered in this court. *Fitch v. Johnson*, 104 Ill. 111; *Bridge Co. v. Highway Comm'rs*, 101 Ill. 518; *Hobbs v. Ferguson*, 100 Ill. 232; *Tibballs v. Libby*, 97 Ill. 552; *N. W. Mut. Aid Ass'n v. Hall*, 118 Ill. 169; *Farwell v. Shove*, 105 Ill. 61; *Kelderhouse v. Hall*, 116 Ill. 147; *Hardy v. Rapp*, 112 Ill. 359; *Ins. Co. v. Sea*, 21 Wall. 158.

If, however, the court considers the question mentioned, we think the authorities cited by plaintiff in error thereon are not in point. An examination of those authorities will show that they apply to contracts between private persons, or where the private party to the contract sought to be relieved. But in no case where the precise question stated below was presented will it be found that the public corporation or municipality was not released from a contract by act of God. The distinction we make is this: Private persons are bound by the terms of their undertakings unless they expressly provide for their release by dispensation of Providence; but a public corporation, *e. g.*, a common carrier or a school district, being required by law or public necessity to discharge a certain duty toward the public, not for its own profit necessarily, but for the convenience, comfort, safety and well being of the people, is released from such duty and its concomitant obligations by providential interference, and that without the necessity of inserting such a provision in its contracts. *Morgan's Addison on Contracts*, 3d Am. Ed., Vol. 1, 479, 480; *Riley v. Horne*, 5 Bing. 220; *Elliott v. Russell*, 10 Johns (N. Y.) 1; *Jamison v. McDaniel*, 25 Miss. 83; *Philadelphia & C. R. R. Co. v. Anderson*, 6th Am. & Eng. R. R. Cases, 407; *Livesay v. Philadelphia*, 64 Pa. St., 106; *Nashville, etc., R. R. Co. v. Davis*, 6 Heisk. 261; *Same v. King*, *Ib.* 269; *Ballentine v. North Miss. R. R. Co.*, 40 Mo. 491.

The plaintiff in error has modeled his proceedings in this case upon the files and papers found in the case of *Scott Crews v. School Directors*, 23 Ill. App. 367. The position we state above is, we think, sustained by that case,

the court by converse statement clearly holding that had the fulfillment of the school directors' contract been made impossible by act of God they would not be held bound by its terms. This position is also sustained by the court in the case of Steele et al. v. Buck, 61 Ill. 343, also cited by plaintiff in error, the court there adopting the language (p. 348) of Chief Justice Shaw, in the case there cited: "The distinction is now well settled between an obligation or duty imposed by law and that created by covenant or act of the party. When the law creates a duty, and the party is disabled from performing it, without any fault of his own, the law will excuse him."

It is apparent from the nature of this contract that the continued existence of the school house was presupposed, and therefore the condition is implied that if performance became impossible by the perishing of (say) Mr. Corn or the school house, that would excuse performance. Chitty on Contracts, 11 Am. Ed. 1076, quoted with approval in Walker v. Tucker, 70 Ill. 543.

The other cases cited by plaintiff in error will be found referred to and commented upon in above mentioned cases of Walker v. Tucker and Steel et al. v. Buck.

There was a controversy in the trial below on the question of fact raised by the special plea, viz., the inability of the defendants to procure suitable and sufficient buildings in which to conduct the schools of the district.

No motion for a new trial was made in the court below and preserved in the bill of exceptions, and hence under the rule announced in Wolf v. Campbell, 23 Ill. App. 482; Gregory v. Spencer, 3 Ill. App. 80; Fireman's Ins. Co. v. Peck, 126 Ill. 493, and cases therein cited, the finding of the trial court on the issue of fact will not be reviewed by this court. An attempt is made to save this point by a recital that such motion was made, and reasons assigned therefor, but as there was in fact no motion ever placed on file or submitted to the court, we do not think the omission can be, or ought to be, supplied in the manner indicated.

Should the court, however, hold to the contrary, we then

respectfully submit that there is abundant evidence in the record to sustain the finding of the trial judge, which is sufficient, where the evidence is conflicting and contradictory, to entitle us to an affirmance of the judgment. *Knisely v. Sampson*, 100 Ill. 573.

Upon questions of fact in trials on the law docket the findings of a *nisi prius* judge are given the same weight as a verdict of a jury. *Travers v. Worms*, 13 Ill. App. 39; *Nimmo v. Kuykendall*, 85 Ill. 476; *Wood v. Price*, 46 Ill. 435; *Thomas v. Rutledge*, 67 Ill. 213; *Vogt v. Buschman*, 63 Ill. 521.

The verdict of jury will be sustained if there is evidence in the record to support it, even if the evidence was conflicting and inconclusive, the Supreme and Appellate Courts uniformly saying the juries and trial courts have the best opportunity of judging of the credibility of witnesses and weight to be given to their testimony. *Calvert v. Carpenter*, 96 Ill. 63; *Armour v. McFadden*, 9 Ill. App. 508; *Hays v. Houston*, 86 Ill. 487; *Lewis v. Lewis*, 92 Ill. 237; *Cohen v. Schick*, 6 Ill. App. 280.

Without waiving our right to ask an affirmance of the judgment for the reasons hereinabove mentioned, we insist the finding was right upon a consideration of all the evidence in the case.

PHILLIPS, P. J. The evidence shows the parties entered into that written agreement, and after the destruction of the school house, the plaintiff was ready and offered to teach in accordance with the contract. The board of education provided rooms in which school was carried on, and certain teachers continued in employment. No building was furnished the plaintiff in which to continue his duties under the contract, though he was ready and offered to comply therewith. He had taught and received pay for one month, and the residue of time he was employed under the contract was three months at \$45 a month, and at the time of employment he held a teacher's certificate of second grade. The destruction of the building as alleged in the second plea was shown.

Consolidated Coal Co. of St. Louis v. Peers.

There is conflicting evidence as to whether another building could have been procured, but it appears from the record that the court held the second plea set up facts which constituted a defense to the action, and on those facts so shown the verdict and judgment was entered. The contract did not by its terms provide that the school board would be discharged from compliance with its terms by reason of the destruction of the school house. The discharge of either party to the contract would not result as a matter of law because of the destruction of the building. Neither would the school board be discharged from liability on their contract by reason of the destruction of the school house, and their inability to procure another building. If it had been desired to discharge either party from the contract for such cause, the contract should have so provided. *Steele et al. v. Buck et al.*, 61 Ill. 344; *School Trustees v. Bennett*, 3 Dutch. 513. The plea set up no defense to the action, and the finding was against the law and evidence. It was error to overrule plaintiff's motion for new trial. The judgment is reversed and the cause remanded.

Reversed and remanded.

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS

V.

JOSHUA S. PEERS AND ADELINE C. PEERS.

Landlord and Tenant—Lease of Coal Lands—Royalty—Action for Recovery of—Guaranty.

1. After an assignment over, the assignee of a lease will continue liable upon any express covenants therein entered into by him in the assignment to himself.

2. Where by the terms of a lease payments are to be made in monthly installments, an action may be brought to recover for more than one month, and the plaintiff is not required to wait until the expiration of any particular year or time longer than a month before bringing suit.

[Opinion filed June 9, 1891.]

39	453
150	344
39	453
59	600
39	453
60	506

APPEAL from the Circuit Court of Madison County; the Hon. W. H. SNYDER, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

Messrs. JOHN G. IRWIN and KROME & HADLEY, for appellee.

PHILLIPS, P. J. On the 17th day of December, 1870, appellees leased to the Abbey Coal & Mining Company for a term of twenty-five years, certain lands, the lessee to pay a royalty of three-eighths of a cent per bushel for all coal mined with certain exceptions, and to guarantee a yearly royalty of not less than \$1,200 after the expiration of the first twelve months, and if no coal should be mined the lessee should pay monthly an installment of \$100 on their guarantee of \$1,200 per year. These payments were to be considered as royalty advanced, and the lessee was to have the right to mine coal to the extent of the royalty paid, but the royalty should not be less than \$100 per month. On the 11th of August, 1886, the Abbey Coal & Mining Company, by deed, conveyed all its interest to the appellant, and by the terms of that conveyance the appellant took the same subject to the agreements in the lease mentioned to be performed by the lessee therein. The appellant accepted the assignment thus made and thereby became the tenant of appellees. On the 26th day of September, 1888, the appellees commenced their action upon the guarantee in the lease, signed by the Abbey Coal & Mining Company, and the assignment was made to the appellant to recover the royalty guaranteed for the year beginning September 17, 1887, and ending September 17, 1888. It was insisted, first, that as the lease was made on the 17th day of December, and being so described in the declaration, that the year for which a recovery could be had must be a year ending December 17th, and not ending September 17th. By the terms of the lease payments were to be made in monthly installments. An action may be brought to recover for more than one month, and the plaintiff is not required to wait until the expiration of any particular

year or time longer than a month before bringing suit, and it was not error to unite in the declaration a claim for more than one month, and for a term of one year from the time of last payment. It was next insisted by appellant that it assigned all the interest it acquired in the lease to one Jacob Lasurs, on the 11th day of August, 1886, and that by that assignment Lasurs acquired all the rights in the leasehold ever acquired by the defendant, and that said assignment was made on November 28, 1887, and the appellant requested the court to hold the following proposition as law: "If the court believes from the evidence that the defendant, in November or December, 1887, by an instrument in writing, assigned and transferred to one Jacob Lasurs all its right and title and interest as assignee of the lessee in the lease in the declaration mentioned, and set over to said Lasurs its leasehold estate under said lease, then the plaintiff can not recover in this cause," which the court refused to hold. By the terms of this agreement the Abbey Coal & Mining Company entered into a covenant to pay monthly installments of \$100 as royalty at the rate of three-eighths of a cent per bushel for all coal mined, and by their covenant, if no coal should be mined the lessee was to pay monthly installments of \$100 per month as an advanced royalty.

This covenant on the part of the Abbey Coal & Mining Company is more than a mere acceptance of a lease of premises and imposes on it a duty other than the payment of rent. It is a contract binding on it that it is not at liberty to disregard of its own motion, and it can not discharge itself from liability. By the terms of the deed made by the Abbey Coal & Mining Company to the appellant, the Consolidated Coal Company of St. Louis, the appellant accepted the conveyance of these premises so leased with other premises and took the same subject to the agreements in the lease mentioned as made by appellees to the Abbey Coal & Mining Company, which agreements were to be performed by appellant. By the acceptance of that deed, appellant, by its covenants, entered into the agreements to be done and performed by the Abbey Coal & Mining Company, and became liable to appel-

lees to the same extent as the Abbey Coal & Mining Company was liable, and by the terms of its covenants, could not, by an assignment of its interest to Lasurs, discharge itself from the obligations of the covenant so entered into. After an assignment over, the assignee of a lease will continue liable upon any express covenant entered into by him in the assignment to himself, and in this assignment the appellant, by its acceptance of the deed of the Abbey Coal & Mining Company, had entered into an express agreement to comply with the terms of the lease from which it can not discharge itself by an assignment over to Lasurs. It was not error to refuse to hold the proposition as asked. The evidence warrants the verdict, and the assignment over not being a discharge from liability of appellant, the judgment must be affirmed.

Judgment affirmed.

THE ST. LOUIS BRIDGE CO. ET AL.

V.

SARAH E. FELLOWS, ADMINISTRATRIX.

Railroads—Bridge Company—Personal Injuries—Defective Track—Evidence—Special Findings.

In an action to recover from a bridge company damages for the death of one of its employes, wherein the jury specially found that the accident occurred through the negligent construction of its tracks, this court holds that the special findings were not warranted by the evidence, and that the verdict for the plaintiff based thereon, should not be allowed to stand.

[Opinion filed June 9, 1891.]

APPEAL from the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

Messrs. G. & G. A. KOERNER, for appellants.

Inasmuch as the mere happening of an accident is not *prima*

39	456
45	590
39	456
52	507

facie evidence of neglect of employer (Smith v. M. & L. R. R. Co., 18 Fed. Rep. 304) we contend that under the evidence the court should have given the following instruction as asked by appellants:

“The court instructs the jury that the plaintiff has failed to sustain by evidence the material facts charged in the declaration and that the verdict must be for defendant.”

Where the whole evidence is so insufficient that it can not sustain a verdict, it is the duty of the court, as a matter of law, to find for the defendant. *Simmons v. C. & Tomah R. R. Co.*, 110 Ill. 346; *L. S. & M. S. Ry. Co. v. O'Conner*, 115 Ill. 261; *Bartellot v. International Bank*, 119 Ill. 271.

An employe can not recover for an injury resulting from one of the usual risks or hazards connected with the business into which he has entered, and which the law will consider that he has assumed when undertaking the duties of the position. *I. B. & W. R. R. Co. v. Flannigen*, 77 Ill. 365; *L. R. & F. S. v. Duffey*, 4 Am. and Eng. R. R. Cases, 637.

A master's liability for injuries to his employe from defective arrangements is not that of an insurer or guarantor, if the defect was apparent to ordinary observation. It is a question of reasonable care and diligence. *Batterson v. C. & G. T. Ry. Co.*, 49 Mich. 184; 8 American and English R. R. Cases, 123.

Under the evidence there can be no doubt that the appellant used not only reasonable care and diligence in providing against a defect capable of causing an accident, but used extraordinary care to provide the best possible appliances.

A master is liable for injuries to a servant only when he knows of the defect causing the accident, or when by the exercise of reasonable care and diligence, he ought to have known. *T. P. & W. R. R. Co. v. Conroy*, 61 Ill. 162; *T. W. & W. R. R. Co. v. Ingraham*, 77 Ill. 309; *C. & H. R. R. Co. v. Platt*, 89 Ill. 141.

The fact that that part of the track where the accident occurred had been in use for a long time prior to the accident, and that no other mishap had ever occurred at the same place, that it was used immediately after the accident, that it had

frequently been inspected and declared all right, and that no one is able to account for the accident, makes it necessary to consider the accident that caused the death of Fellows one of the risks or hazards incident to his employment.

The jury, by their special verdict, find that the death of Fellows was caused by the negligence of the track inspector, and as a switchman and track inspector are co-employees, the refusal of the following instruction was error:

“Even if it should appear from the evidence that the track was out of repair, owing to the negligence of the track foreman or road master, or any person charged with an examination of the track, employed by the company, the defendant can not recover, the switchman and the track inspector employed in the same yard being co-employees.”

All who engage in accomplishing the ultimate purpose in view, that is, running of the road, must be regarded as engaged in the same general business, within the meaning of the rule. *Hurd v. V. & C. R. R. Co.*, 32 Vt. 473.

Those who are engaged in the service of the same master in carrying on and conducting the same general business in which the usual instrumentalities are used, may justly be called fellow-servants.

A proper test of this relation is whether the negligence of the one is likely to inflict injury on the other. *Valtez v. O. & M. R. R. Co.*, 85 Ill. 500.

Messrs. W. P. LAUNTZ and JESSE M. FREELS, for appellee.

Sweeney, their track foreman, on cross-examination, says “he constructed this track” about two years before, and that he “did not give the outside rail any elevation,” and that no double or second rail was placed there to take the place of elevation on this curve. This track was dangerously defective in its construction, and the defendants had notice of these defects in their track, which were defects in construction, two years before the time of the injury, and were guilty of gross negligence in failing to remove them and make the track safe; and appellant, having thus negligently failed to take any steps to make its track safe, is liable for this injury

caused by its negligence. C., B. & Q. R. R. Co. v. Gregory, 58 Ill. 273; Whalen v. I. & St. L. R. R. & Coal Co., 16 Ill. App. 324; C. & I. R. R. Co. v. Russell, 91 Ill. 298; Ill. Cent. R. R. Co. v. Welch, 52 Ill. 183; C. & A. R. R. Co. v. Johnson, 116 Ill. 206; T. P. & W. Ry. Co. v. Conroy, 68 Ill. 561; North. Pacific R. R. Co. v. Herbert, 116 U. S. 647; Chicago & N. W. Ry. Co. v. Swett, 45 Ill. 201.

In the Swett case, *supra*, our Supreme Court say: "It is well settled the employer corporation is bound to furnish to their servants safe materials and structures. Such an obligation is permanent, and can not be avoided by the delegation of the power or authority to any other, or number of persons; for the undertaking with their servants is direct, that they will furnish suitable and safe materials and structures, and properly skilled and careful persons to assist in running the trains, * * * and most especially that they shall, in the first instance, properly construct their road with all its necessary appurtenances."

The duty of building this track on this fourteen degree curve with an elevation on the outside rail, and with a second rail on the inside of the inside rail on said curve, in order to make it a safe track for the purposes for which it was used, was a duty imposed by law, as alleged in the declaration, upon the defendants, and the failure on their part to thus construct said track was an "omission and a failure of duty in construction, for which they are liable to the plaintiff." Chicago & C. I. R. R. Co. v. Hines, 23 N. E. Rep. 1022.

But in addition to this notice of these patent defects in construction, which the defendants were in law bound to know and take notice of, they had actual notice of the dangerous condition of their track at this curve, by having had other engines and cars run off there before this injury.

And appellant was also guilty of negligence in failing to exercise ordinary care in the selection of the servants in charge of its tracks. An examination of the evidence of Sweeney, the track foreman, and of Comer, his assistant, will show that they were wholly incompetent for the responsible positions they held, and that appellant knew this, or by the

exercise of ordinary care might have known it, long before the injury.

The learned counsel for appellant assign for error the giving by the court of the instruction asked by appellee, but have failed to urge or discuss this assignment in their argument, and, as they have abandoned this assignment, we will not trouble the court with an extended consideration of it, but will content ourselves by saying that said instruction was properly given; that it presented the case fairly and fully, under the law and the evidence, to the jury, and that it is sustained by the law as expressed in *Whalen v. I. & St. L. R. R. & Coal Co.*, 16 Ill. App. 323; *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 186; *C. & I. R. R. Co. v. Russell*, 91 Ill. 303; *T. P. & W. Ry. Co. v. Conroy*, 68 Ill. 561; *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 109, and other cases.

GREEN, J. The case was before us on appeal at the August term, A. D. 1889, and is reported in 31 Ill. App. 282. The jury (as shown by that record) then, in answer to the question, "What officer, agent or employe, or servant of one of the defendants, was guilty of negligence, resulting in the death of Fellows?" said, by their special finding, "The officer in charge of said *track repairing*;" and, in answer to the question, "In what did the negligence of such officer, agent or employe consist?" said, by their special finding, "In *failing to keep said track in proper condition*." We reversed the judgment and said in the opinion: "We find no evidence establishing the charge that the track and road bed at place of accident was not properly constructed;" and further said, "We discover no evidence in this record justifying the verdict." In the present record it appears the jury specially found that the negligence of the defendants, resulting in the death of Fellows, was in *not properly constructing the tracks in question, in the ordinary and usual manner, according to the methods usually adopted for such construction*. Upon these special findings the general verdict is based, and can only be sustained on the ground that the evidence justified such special findings. The appellee, at the trial, introduced as ex-

perts upon the question of construction, Weber, Locke and Bisdorn. Weber, a surveyor and civil engineer, after he had testified what elevations of the outside road, at a curve, should be given, according to the rules for building tracks at curves laid down in the books for engineers, further testified that the elevation of the track in the switching yards would be impossible; that what he had said about elevations at curves applied to the *main track* on the road; that the reason it would be impossible to construct in that way in the yards, was, that the different elevations would interfere with the crossings of switches. This witness, in reply to the cross-interrogatory, "Consequently, when you look upon these as a construction of switch tracks in yards, they are properly constructed, are they not?" testified: "I think so." Locke, who was in real estate business, and a civil engineer by profession, testified the rule was, in a track having a curve of thirteen or fourteen degrees, to elevate the outside rail a good deal higher than the inside rail; did not remember just what it should be; that it had been a good while since he had had anything to do with that. And in answer to the question, "Is a track with a fourteen degree curve properly constructed flat?" said, "No, sir, I think not." On cross-examination he testified he did not know anything about the yards of defendants, and had never been in them. That he was not very much familiar with the construction of said road tracks in switch yards. That he had constructed yards a good while ago. That the rule he referred to in regard to tracks, is where the train is supposed to have an unimpeded run; there an elevation is proper. That he thought it would be practicable to have a slight elevation; not so great an elevation in yards of this character. That he had never examined the yards in question at all, and had not paid any attention to the switch yards of any other railroads. Bisdorn, a civil engineer in the railroad business, testified: "There is a rule in engineering that the outside rail should be higher than the inside rail, on a curve, according to the speed of the train going over it. On a curve of thirteen or fourteen degrees, when a train is going ten or fifteen miles an hour, the elevation should be an inch to an inch and a quarter."

In answer to the question, "Then a track with a thirteen or fourteen degree curve—is that properly constructed level?" witness said, "you must understand me. I am talking now about a straight track." He was then asked "and when you come to a curve?" and replied, "and there you come to a curve in the track." He was next asked, "You say, then, that a track with a thirteen or fourteen degree curve would not be properly constructed unless the outside rail was raised in accordance with what you have stated?" and answered, "Yes, sir." The cross-examination of this witness confirms the inference we draw from his testimony in chief, that the elevation of the outside rail is proper at a curve on the main track but not in yards like those in question here. Taking all this expert testimony together and giving it a construction as favorable to plaintiff's theory as we think it entitled to, and it fails to justify the finding of the jury that the track and switch in question were not properly constructed.

Supplementary to this expert testimony, and for the purpose of proving that the track in question was improperly constructed, plaintiff introduced and examined several witnesses. May testified: "Had done track work and switching; was not a track builder, worked at it. As a general rule the outside rail is elevated on a fourteen degree curve. So far as the degree of curve is concerned, I don't know anything about degrees. It has been some time since I worked at it. As a rule the outside rail is elevated on a curve. It is considered safe to have it elevated." To the question "Is it considered unsafe when it is not elevated?" he replied, "Well, yes, I know it cuts the rail when it is not elevated. It is liable to climb the rail; the car run off the track." To the question, "Is it considered unsafe, Mr. May, to so construct a track that the engine will run off?" he replied, "They usually build them so that they won't run off; that is what they are built for." On cross-examination this witness testified he was not acquainted with the bridge yards; did not know when the accident happened; and in answer to the question, "Do you know whether those tracks, leads and switches are properly constructed for the purposes for which

they are used or not?" testified, "No, sir; I don't know anything about it." Warren, a switchman, testified a track with a fourteen degree curve is not properly constructed flat. To have it safe according to the rule it should have an elevation in the outside rail; that is to prevent the engine from leaving the track. When the outside rail is not on an elevation the simple thing is the engine goes off the track. It might go over a dozen times and the thirteenth time it would go off and kill everybody. - On cross-examination, after he had testified that it would be practicable to build the track on a curve in the yards with the outside rail elevated, he testified, "You can not split the switches, but after it leaves the main track it can be elevated, after it leaves the frog;" and was then asked, "But just at the place it leaves the frog can there be an elevation?" answered, "There can, yes sir, by raising the rail with the plates;" and was then asked, "Is that the usual and practicable construction?" replied, "Well, I could not say that that is the usual and proper construction. I am not well enough posted in track work to say that;" and on re-examination testified he knew what was necessary to make a safe track. That unless they elevate the rail an engine going around is very likely to get off the track; that unless a track is elevated and has a guard-rail it is not safe. Hakes, the same witness whose testimony we commented on in the former opinion, testified again, and it is unnecessary to add anything to what we there said; it is applicable to his testimony in this record. Reynolds, switchman, testified he knew where these tracks and grounds were, and was asked, "I will ask you whether this track with a thirteen degree curve is properly constructed flat then?" he answered, "Well, yes sir;" and was next asked, "You say it is properly constructed flat?" and answered, "Well, I don't know anything about that;" and was next asked, "You did not understand my question. I asked you if a track with a fourteen degree curve is properly constructed flat; if the outside rail is not elevated?" and then answered, "Well, if it is not elevated why of course it is not constructed properly;" and then testified he did not think it would be safe unless it was elevated. On cross-examination,

being asked (after stating he knew where accident happened) if he considered the track there properly constructed, answered: "Well, I am track man myself;" then said he had worked there over those tracks, and the same question was then again asked him and he replied, "Well, I will tell you; at the time this happened I was working for the Bridge & Tunnel Co. up until 1886. I quit there in 1886 and was not working at the Bridge & Tunnel until 1888."

He then testified "these tracks were then there. So far as their condition was concerned we had no trouble, only in 1884 a car got off the track. Since I was there this switch has been used all the time, day and night. As far as the elevation of the track is concerned, I am no track man, don't know what it ought to be; it ought to have a little elevation;" and was asked, "Where there are so many switches and frogs, is it proper construction to have the outside rail elevated? is it not dangerous?" replied, "I don't know anything about that." Bucklew, train dispatcher, said to a certain extent he was familiar with the construction of railroads; not about East St. Louis; should judge a track with a thirteen degree curve is not properly constructed flat; should say a curve should have a guard-rail, or be elevated more or less; the elevation would depend on whether the curve is short or long. The outside rail is elevated to keep the engine from running off in turning the curve." On cross-examination admitted he had no personal knowledge of building railroads and was not prepared to answer the question as to whether the track at the place of the accident was properly constructed or not; never examined that place and did not know whether the track was properly constructed or not. Sweeney, track foreman for defendant, testified that deceased was employed as switchman for defendant for five or six months preceding his death; that, in the opinion of witness, no elevation of outside rail was needed on a switch like the one in question. Can determine by looking at track that it is in good condition; looked at track after the accident; it was all right. "I saw the track was all right. Outside rail did not need any elevation; was there probably twenty minutes or half an hour after

accident; engine then off the track; in constructing tracks we use a gange. We tested track with gauge where engine went off; found the track was all right. Had not put in any rail there the day before; did not change the guard-rail there the day before or the same morning; John Conner is my assistant; he is a track walker. If he sees defects in track his duty is to report to me; to tighten bolts and see that things in general are all right. When I give him orders he puts down rails and changes guard-rails. When the engine was put back on track they tried to move the engine over the same track and it struck the guard-rail; did not turn off; did not remount the rail; don't know why it did not go ahead with it. The damage done to track was repaired; just leveled up the place again. The guard-rail was there until the track was moved, three to six months ago. The same guard rail is there yet in that track. Could not say why they backed the engine off, and through some other track. Was around there until engine was put on track, backed out of the switch and run down on another track. I believe I saw that place day before the accident; would not say positively." On cross-examination, this witness testified: "These tracks are in the defendants' yards. It is a good yard; there are no better switches and no better yards in the United States, and none better taken care of; saw the place where the engine got off the day before, or day before that. It was in good condition; and after the accident it was in the same condition, and the same switch was used. The same switch and rails are used there yet. I can show the same guard-rail down there yet. Have had twenty-two years' experience in the laying of railroad tracks; seven years with defendant company. At the point where accident occurred I could perceive nothing that would cause it. The switch is built on the same principle as all other switches. Robert P. Taussig was the engineer in charge of the construction of the tracks. Watts, switchman in employ of defendant, saw place of accident about twenty minutes after it happened; engine was off the track; was not there more than

ten or fifteen minutes; made no examination of the track; suppose there is a cause for an engine running off the track; frequently you can not see the cause." On cross-examination he testified: "We are switching over the same place where accident occurred every day." The testimony of Bennett, the same witness who testified at the former trial, was the same as theirs, and what we said in former opinion about it applies now. John Conner, a track walker in defendant's employ, described his duties. Was at place of accident about an hour after it happened. It was all right as far as he could see and judge; engine was off the track; nothing was done to the rails so far as he could see; there was a guard-rail there; "I did not put it down; could not tell who put it down; could not tell when it was put down, but guess it was put down when the track was laid." On cross-examination witness testified he had been employed as track walker in these yards for two years before the accident. Saw this switch and guard-rail at the place deceased was hurt once a day, and sometimes twice. It was in general use all this time. Sheers, assistant yard master of defendant, testified he rode over the track at place of accident every day in 1886. Could not say anything about elevation of rails at curves; the outer rail is provided with guard-rail. On cross-examination testified he had been acquainted with these yards where this accident occurred for eight or nine years; passed along there every day on an engine. This switch was in use all the time since it was built. It was in good order. It was used afterward on the day of accident; kept right on working. On re-examination said he did not inspect that track; passed over that switch three or four times before the accident that morning. Kensall, switchman in employ of defendant, was at place of accident not long after it occurred. Was sent to help put engine on track; did not see engine jump off; helped put it on; best recollection is that engine started to run off again and then dropped down. On cross-examination testified he had passed over that switch often; as far as he could see it was all right; did not examine it closely; it was like any other switch; had not noticed it that morning; did

not know whether it was all right when that engine ran over it. Dunlap, agent for defendant, was at place of accident; got there and engine was moved about forty feet back, and when they moved it forward it started to mount the guard-rail. This was near the place it had run off. The engine was injured in running off the track and from the contact with other cars.

On cross-examination testified the general condition of that yard is better and the tracks in as good condition as any yard he ever saw. That same switch was in constant use ever since and on same day of accident. Hardway, engineer running the engine at time of accident, testified that the engine was going from one track to another at from six to about eight miles an hour, and when the engine got to the guard-rail it jumped the track and went cross-ways into cars standing there, about from eight to fifteen feet. It happened very suddenly. Where the accident occurred there is not a very sharp curve, but a slight curve. After engine got back on track started forward again and it started to mount the guard-rails at same place. Then we backed out and went up another track. I went by signals and presume we did not go up the same track, because the engine would not go over there. We then ran the engine to the shop, across the bridge. If that track had been all right I suppose the engine would have run over it. Could not say, that was my first trip over that track that day. That was the first day I had worked in that yard for a good while; had been working nights. On cross-examination, testified he could not account for the accident; did not know whether track was in order or not; supposed if track was in order engine would have gone over all right; passed over same place while working there nights; nothing had ever happened there before. An engine is liable to jump the track and they claim they can not tell whether there is anything the matter with the track or not. Lots of times they jump the track and the cause is not known, but it seems there ought to be some cause or they would not jump. Had worked in that yard since that time; worked down there several times. Berg, the fireman on

same engine, testified he was on front end of engine when accident occurred. "After the accident the engine was pulled back on the track; did not notice whether engine mounted the guard-rail after they started it forward; suppose they backed her out. We were going about five or six miles an hour. There must be a cause for engine leaving the track, but what cause I do not know. Have run on that track lots of times since that accident. If the track is in good order and the engine is all right, and an engine jumps the track running at that speed, there must be something to cause it, whatever it is I do not know. To the best of my knowledge the track there is a flat track." Wilson's deposition, the same as on former trial, was read, and we desire to add nothing to what was said concerning his testimony in the former opinion. Baily's testimony related only to the duties of switchmen. The evidence of Sweeney on former trial upon cross-examination by plaintiff was next read. He testified he built switch in question; did not give outside rail any elevation; did not have a rail on the inside of outside rail; track was built there about two years before the accident. Don't know where engine got off the track. Was there shortly after accident occurred; saw engine off the track. Can't tell when repairs were made there before accident. Know no repairs were made there the day before. "Conner did not make repairs or put down rails except by my instructions. If he made any repairs at this place I don't know anything about it." The foregoing witnesses were all that testified in behalf of plaintiff; and while we have not reproduced all their testimony, we have stated all that seemed material upon the question of the construction of the track and switch at place where the engine was derailed. And this evidence, including the testimony of these experts examined on behalf of plaintiff, falls far short of proving the facts found by the jury, viz.: That the negligence of defendants resulting in the death of Fellows *consisted in not properly constructing the tracks in question in the ordinary and usual manner, according to the methods usually adopted for such construction.* But in addition to this, the testimony of three experts testify-

St. Louis Bridge Co. v. Fellows.

ing on behalf of defendants, further negative that special finding. Taussig, the civil engineer who laid out and constructed the track and switch in question, Sharinan, a civil engineer engaged in civil engineering on railroads, Eayre, a civil engineer of large experience in this kind of work, all concur in the opinion, and so testify, that these tracks were constructed in a safe and proper manner, and in accordance with the most approved methods. Moreover it appears in evidence that for a long time before this accident and ever since, engines and trains have been continuously operated over this track and switch day and night; that no change of construction has been made, and no complaint or remonstrance appears to have been made by the employes engaged in running and operating such trains. It seems incredible that they would incur the extra hazard which would be imposed upon them if this structure was unsafe or defective for so long a time without objection, or that defendant corporations would permit such track and switch to be so used, if dangerous or improperly constructed. In view of all the facts and circumstances proven, we are compelled to hold that the special findings were not warranted by the evidence, and the general verdict based thereon should have been set aside and a new trial awarded. The other questions to which our attention has been invited by counsel for appellant, we deem it unnecessary to discuss, inasmuch as we find the evidence insufficient to justify the special finding and verdict of the jury. The judgment is reversed and cause remanded.

Reversed and remanded.

AARON BAER, IMPLEADED, ETC.,

V.

HENRY KNEWITZ.

Mortgages—Foreclosure—Sale Subsequent to Mortgage—Assumption of Incumbrance—Decree Pro Confesso.

Upon bills filed to foreclose mortgages, the fact being that subsequent to the giving thereof, the property in question was sold to another, it being alleged that the grantee assumed the same, this court holds, there being no allegation in complainant's bill that the grantee ever accepted the deed from the grantor, that the recital in said deed is not the promise of the grantee; that in the absence of an averment of assent said recital is not sufficient, standing alone, to create a liability against him, and that the averments of the bill are not sufficient, on a default, to authorize a decree *pro confesso* against said grantee for a personal liability for the debt of the grantor.

[Opinion filed February 26, 1891.]

IN ERROR to the Circuit Court of St. Clair County; the Hon. GEORGE W. WALL, Judge, presiding.

A bill to foreclose a mortgage made by Conrad Benner and Elizabeth Benner to secure certain notes, was filed in the St. Clair Circuit Court by John Seibert, and on the same day a bill was filed to foreclose a mortgage made by the Benners to Henry Knewitz in which defendant in error was complainant. These causes were consolidated at the May term, 1889, of said court and a decree entered. No question arises on the bill of Seibert under the assignment of errors. The bill of defendant in error avers the execution of notes and mortgage to Knewitz by Conrad Benner and default in payment. The bill then contains this averment:

“And complainant further shows that he is informed and believes that Aaron Baer and Louis Bartel have, or claim to have, some interests in the mortgaged premises as purchasers, mortgagees, judgment creditors or otherwise, which interests, if any there be, have accrued subsequently to the lien of said mortgage deed and are subject thereto, and that John Seibert

has a prior mortgage on said land. Complainant further shows that on the 5th day of June, 1886, by their deed of that date, said Conrad Benner and Elizabeth Benner conveyed and warranted to said Aaron Baer the real estate herein above described, subject to the mortgage of John Seibert for \$3,000, and subject also to the above mortgage of complainant. Both of which mortgages the said Aaron Baer in and by said deed assumed to pay as part of the consideration."

The bill makes a copy of the deed an exhibit in the case. The deed so made an exhibit to the bill is in the statutory form and in addition contains this clause: "Subject, however, to two mortgages, one for \$3,000, made to said Baer and by him assigned to John Seibert, and the other for \$2,000, made to Henry Knewitz, both of which said Baer assumes to pay as part of said consideration." That deed purports to be made by Conrad Benner and Elizabeth Benner to Aaron Baer. A default was entered to the two bills and the cause referred for computation, and the report of the master shows the amount due on each mortgage and a decree *pro confesso*. The following finding was entered: "The court further finds, that on the 5th day of June, A. D. 1886, by their warranty deed of that date, said Conrad Benner and Elizabeth Benner conveyed and warranted to said Aaron Baer the said real estate herein above described, subject to said two mortgages herein described, the one held by John Seibert and the other held by Henry Knewitz; both of which mortgages the said defendant, Aaron Baer, in and by said deed assumed to pay as part of the consideration expressed in said deed, which deed is duly recorded in the recorder's office of said county of St. Clair, in book 183, p. 263." It is then among other things decreed by the court, "that said master specify the amount of such deficiency after deducting the costs and expenses of said sale, and that on the coming in and confirmation of said report, the defendant, Aaron Baer, who is personally liable for the debts secured by the mortgage by the amount of such deficiency," etc. On sale being made and on the coming in of said report and its confirmation the following order was entered at the September term, 1886, of said court.

It is therefore ordered by the court that said complainant, Henry Knewitz, have personal judgment against said Aaron Baer for said deficiency in the sum of \$671.95, with interest thereon from the 17th day of August, 1889 (the day of sale), and that he have execution for the collection thereof, as provided for in the decree of this case rendered at a prior term of this court. Thereupon the defendant, Aaron Baer, sued out this writ of error and assigns error.

First. The Circuit Court erred in rendering a decree against Aaron Baer for the payment of \$671.95, without any liability alleged in the bill of said Knewitz.

Second. The Circuit Court erred in rendering a personal decree against Aaron Baer, when the allegations in the Knewitz bill do not set forth a personal liability for the mortgage debt, wherefore plaintiff in error prays that the decree entered at the September term, 1889, be reversed, etc.

MR. WILLIAM WINKELMANN, for plaintiff in error, Aaron Baer.

MR. CHARLES P. KNISPEN, for defendant in error.

PHILLIPS, P. J. There is no allegation in this bill that Aaron Baer ever accepted the deed from Conrad Benner and Elizabeth Benner. The recital in the deed is not the promise of Baer, the grantee; and unless his assent is averred that recital is not sufficient, standing alone, to create a liability against him. The averments of the bill are not sufficient on a default to authorize a decree, *pro confesso*, against the plaintiff in error for a personal liability for the debt of Conrad Benner. *Thompson v. Dearborn et al.*, 107 Ill. 87. The court erred in rendering a decree for the payment of \$671.95. That decree of the September term, 1889, awarding execution, is reversed and the cause remanded.

Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1888.

OHIO, INDIANA & WESTERN RAILWAY COMPANY
V.
THE PEOPLE OF THE STATE OF ILLINOIS, FOR USE,
ETC.

Railroads—Obstructions of Streets—Standing Cars—Municipal Ordinance—Secs. 77 and 78, Chap. 114, R. S.

1. The term highway includes all kinds of public ways, and as used in Secs. 77 and 78 of the Railroad and Warehouse Act would include a street in a city and should be so applied, unless it is apparent that by some other legislative provision the exclusive control and jurisdiction over, and the right to prevent obstructions to, such street has been vested in the local municipality.

2. In certain cases the same act may be an offense against the State and against a municipality, and may be punished by both.

[Opinion filed February 2, 1889.]

APPEAL from the Circuit Court of McLean County; the
Hon. A. SAMPLE, Judge, presiding.

Messrs. C. W. FAIRBANKS and FRANK Y. HAMILTON, for
appellant.

Mr. JOHN STAPLETON, for appellee.

WALL, P. J. This case was tried by the Circuit Court upon appeal from a justice of the peace, a jury being waived, on the following stipulation or agreed state of facts, viz.: "That this suit was commenced on the 31st day of March, 1888, in the name of the people of the State of Illinois, for the use of Henry C. Dickerson against the said defendant, for alleged obstructions of streets in the city of Le Roy, in said county and State; that the street running north and south immediately west of the depot of defendant in said city of Le Roy was blockaded by cars being permitted to remain on the side track of defendant from on or about March 25, 1888; that said street so obstructed is within the corporate limits of the city of Le Roy as aforesaid; that said city of Le Roy is an incorporated city, and that it has passed a valid ordinance providing for the care, control and management of the streets and alleys within the corporate limits of said city, and also providing a penalty for obstructing the streets of said city."

The court found defendant guilty and assessed a fine of \$10, from which judgment an appeal is prosecuted to this court.

The proceeding is based upon Secs. 77 and 78, of Chap. 114, R. S., in reference to railroads and warehouses, whereby it is provided that railroad corporations shall not obstruct public highways by trains or cars except to receive or discharge passengers, or to take fuel or water, and in no case longer than ten minutes, and that for each offense such corporation shall forfeit the sum of not less than ten, nor more than \$100, to be recovered in an action of debt in the name of the people, etc., for the use of any person who may sue. It is urged on behalf of the appellant that the term public highway as here used does not include a street in a city where the municipal corporation has, by ordinance, undertaken, in pursuance of its corporate authority, to regulate and prevent such obstruction of its streets.

A highway is defined to be a passage road or street which every citizen has a right to use, 1 Bouv. Law Dic. 586, and a street is a public highway or thoroughfare in a city or village. 2 Ib. 551.

The term highway is generic and includes all kinds of public ways, and as used in Secs. 77 and 78 of the Railroad and Warehouse Act, would, of course, include a street in a city and should be so applied, unless it is apparent that by some other legislative provision the exclusive control and jurisdiction over, and the right to prevent obstructions to such streets, has been vested in the local municipality. So far as granting the right of way is concerned, as the fee of the street is in the city, there is no doubt its authority is complete, but the question is whether the exclusive power to enforce this police regulation has been remitted by the State to its local agency, the city.

Admitting, as argued, that the city of Le Roy is incorporated under the general law, its power over the subject rests upon clauses 9, 10, 25 and 27, par. 63, Chap. 24, R. S. The ninth clause confers power to regulate the use of streets; the tenth, to prevent and remove obstructions to the same; the twenty-fifth, to provide for and change the location, grade and crossings of any railroad, and the twenty-seventh, to require railroads to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads, and with reference to the grade of railroad tracks and the keeping open of drains, etc., under and along the same. We have been referred to no other provisions as to this point, and assume there is nothing else.

The ninth and tenth clauses are, perhaps, broad enough to invest the city with power to pass such an ordinance as in the argument is referred to. The stipulation upon which the case was tried does not state the provisions of the ordinance, and it can not be determined therefrom whether it applies to railroads or not.

It seems clear, however, that there is in these clauses no abdication of power by the State, no surrender or remission to the local municipality. Such an abdication or remission or surrender might, we make no doubt, be inferred from any language plainly investing the city with exclusive authority in the premises. At most, we think it can be said only that,

while the State has fixed a penalty for the offense described, it has given the city power to legislate generally upon the subject of preventing and removing obstructions to streets and the use of streets.

It is familiar doctrine that the same act may be an offense against the State and against the city and may be punished by both. In Cooley on Constitutional Limitations, it is said, 199: "Nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the State law on the same subject, but the State law and the by-law may both stand together if not inconsistent. Indeed, an act may be a penal offense under the laws of the State, and further penalties under proper legislative authority be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the other."

The same view has been announced in *Wragg v. Penn Township*, 94 Ill. 11, where will be found an exhaustive consideration of the subject, including former decisions in this State.

We are of opinion there was no error in this judgment and it will, therefore, be affirmed.

Judgment affirmed.

ROBERT A. ANDERSON AND ROBERT P. ALLEN

V.

WILLIAM THIELE, SR.

Real Property—Drainage—Embankment—Evidence—Instructions.

In an action brought to recover for injury to farm land through the building of an embankment, whereby its drainage was obstructed, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Pike County; the Hon. C. J. SCOFIELD, Judge, presiding.

Anderson v. Thiele.

Messrs. ORR & CRAWFORD and EDWARD YATES, for appellants.

Messrs. W. E. WILLIAMS and A. BEAVERS, for appellee.

WALL, J. Appellee recovered a judgment for \$195 against appellants in an action on the case. The ground of complaint was that the appellants had erected a levee or embankment along the line, dividing their land from that of the appellee, whereby the natural course of drainage was obstructed and the land of appellee was injured, crops were damaged, etc. The defense was that the appellee had made an artificial ditch or water-course on his land whereby water in greatly increased quantity was thrown upon the land of appellants and that to protect themselves against such increase they built the earthwork in question. The appellee contended that he was not responsible for the so-called artificial ditch or water-course, because it was the result of natural causes and that the obstruction complained of not only affected the flow in said channel, but prevented the passage of water in a diffused state over a wide stretch of land (having no connection with said channel) where, from the natural condition of the surface, the flow was from the premises of appellee to and upon the premises of appellants.

Upon these contentions the evidence was somewhat in conflict, but the jury were fully justified in finding the issues for the plaintiff. The damages allowed are not excessive. The chief objection urged by appellants is as to the action of the court in giving the first, second, fifth, sixth and seventh instructions asked by the plaintiff. We think there was no error in this respect. As to the first, second and fifth, the main criticism is that they are misleading and that they ignore the theory of the defense; but it is apparent, when they are read along with the other instructions given at the instance of the plaintiff and those given for the defendants, that there is nothing substantial in this complaint. The sixth instruction announces a correct legal proposition as to the effect and competency of certain declarations of a witness not a party to the suit.

It is insisted also that the court erred in refusing a number of instructions asked by defendants, but the specific ground of this objection is not pointed out. We find on examination that the court did give a large number of instructions asked by defendants, occupying nearly ten pages of the printed abstract, fully covering all points necessary for the defense, and we are satisfied that if there was any error in this respect it was against the plaintiff. Cross-errors have been assigned by appellee relating to the action of the court in admitting and excluding evidence and in giving and refusing instructions, the argument being confined in the main to the latter. Whatever errors may have been committed against the appellee he was not prevented from recovering a verdict which he reduced by remitting the sum of \$5, leaving the amount for which judgment was rendered in his favor. At the close of appellee's brief we find, after a full discussion of the errors and cross-errors, a declaration that the judgment ought to be affirmed, from which we infer that appellee is satisfied with the judgment and does not seek the ruling of this court upon the cross-errors unless the judgment should be reversed on some of the errors assigned by appellants.

We are of opinion that substantial justice has been done and that the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

HENRY TOBIN

v.

J. H. COLLIER.

Mechanic's Liens—Bill to Enforce—Written Contract.

In a proceeding to enforce a mechanic's lien, this court construes a writing given the defendant by the complainant setting forth the amount for which certain labor and material would be furnished, and affirms the decree for the latter.

[Opinion filed January 24, 1891.]

Tobin v. Collier.

APPEAL from the Circuit Court of McLean County; the Hon. OWEN T. REEVES, Judge, presiding.

Mr. C. F. MANSFIELD, for appellant.

Mr. THOMAS F. TIPTON, for appellee.

WALL, J. This was a proceeding to enforce a mechanic's lien. • Decree was rendered, as prayed, for \$54.27, from which an appeal is prosecuted to this court by the defendant. It appears that the defendant, who was building a dwelling house, applied to the complainant, who was a hardware merchant, to furnish certain articles of hardware, tin work and cresting contained in a list of specifications made out by an architect.

The complainant made his estimate on the articles of hardware, but was in doubt as to the meaning of the specifications in regard to the tin work, and was unable also to estimate the cresting because he had no manufacturer's catalogue describing the kinds called for. The weight of the evidence tends to prove that it was fully agreed by the parties that the complainant would furnish the whole bill, except the cresting, for \$128.45, provided the entire amount of tin work should not exceed 580 square feet, for any excess whereof six cents per foot should be charged, and for any less a deduction should be made at the same rate.

The defendant wished the matter put on paper and as the hour was late and it was near the time of the train which defendant was to take, the complainant gave the defendant a writing as follows:

“GIBSON CITY, ILL.

“HENRY TOBIN, Esq., Howard.

“*Dear Sir:*—I will furnish you hardware for your house as per specifications furnished me and marked ‘A,’ for \$128.45; goods to be delivered at Howard, Ill.

“J. H. COLLIER.”

The above includes labor of putting on roof.”

The complainant furnished the materials and the work and

the defendant insisting that \$128.45 covered it all refused to pay more. The present suit was to recover for the price of the cresting and for the excess of the work over 580 square feet.

It is now contended by appellant that as the contract was reduced to writing, oral proof can not be heard to explain or contradict it, and that there is nothing in the case to give a court of equity jurisdiction to reform the written contract.

It will be seen that the writing which constitutes the agreement relied on proposes merely to furnish the *hardware and the labor of putting on the roof*.

In terms, nothing more is undertaken. The proof does not show that the word "hardware," as used by builders and architects would include tin work or cresting. In the common acceptation of the term, tin work would not be included, and it would be a strained and forced construction to make it include the item of cresting. It might as well include iron fencing. Taking that view there is no difficulty in the case. The complainant does not seek all he might in respect to the tin work, but confines his demand to the excess over 580 feet, and to the price of the cresting. But if it should be conceded that the written agreement is uncertain and ambiguous, so that it must be disregarded, then there is proof that for the whole service, including labor and materials, the complainant might reasonably receive the sum here allowed in addition to the \$128.45 which was paid.

It is probably true that it was not intended by the parties that the bid should include the entire list contained in the specifications, and that the only purpose of the writing was to state the amount, subject to the conditions, which both parties well understand, and it is fortunate that without doing violence to the language used, the real understanding can be carried out. The decree appears to be just and it will be affirmed.

Decree affirmed.

TIMOTHY NEALON AND JOHN MCGONNIGAL
V.
THE PEOPLE OF THE STATE OF ILLINOIS.

Practice—Indictments—Quashing of—Grand Jury.

1. A motion filed to correct the record, so as to show the method of completing panel of grand jurors, by a defendant, previously to pleading to an indictment, should be overruled where none of the grounds mentioned therein would have justified the court in quashing the indictment.

2. A grand jury, when properly organized, meets and adjourns upon its own motion, without reference to the temporary adjournment of the court, and it may lawfully proceed in the performance of its duties whether the court is in session or not; but this right to remain in session will not extend beyond the final adjournment of the court for the term, but within such limits it will be governed by its own wishes, subject to the control that the court at all times has over it.

3. A mere irregularity in drawing a jury is not sufficient cause to sustain a challenge to the array, unless the irregularity complained of is of such a character as would probably have produced a change in the panel, or presented a list of names to choose from, different from those which would be produced by a compliance with the law.

4. In the case presented, this court holds as erroneous, the overruling of the challenge to the array of the petit jury, the county board having disregarded the provisions of Sec. 2, Chap. 78, R. S.

5. When a case is called for trial, and the regular panel of twenty-four men is for any cause not full, the court may order it filled from the bystanders; but after the selection of the jury has begun and this number becomes reduced, so there are not twelve jurors to place in the box, the court should order only enough to be selected from the bystanders to keep twelve men in the box and need not keep the original panel of twenty-four full.

6. The questions to be asked of jurors on their *voir dire*, and the time permitted to be occupied in examining jurors, is largely within the discretion of the court in a given case.

[Opinion filed January 24, 1891.]

IN ERROR to the Circuit Court of Macon County; the Hon. E. P. VAIL, Judge, presiding.

Messrs. RUBENS & MOTT, JAMES J. FINN and D. HUTCHINSON, for plaintiffs in error.

Mr. I. R. MILLS, State's Attorney, for defendant in error.

CONGER, P. J. Plaintiffs in error were indicted, tried and convicted for selling intoxicating liquor to minors. They bring the record to this court and assign numerous errors.

It appears that upon the convening of court but seventeen grand jurors answered, whereupon the court ordered the sheriff to summon from the body of the county six persons having the qualifications of grand jurors. That the sheriff summoned six persons from the bystanders, four of whom resided in the township of Decatur, and these six, with the seventeen originally summoned, constituted the grand jury that found the indictment upon which plaintiffs in error were tried.

Plaintiffs in error before pleading to the indictment filed a written motion, supported by affidavits, to correct the record, so as to show that the verbal order made by the court to the sheriff was to summon from the bystanders a sufficient number to complete the panel of grand jurors; and also to show that of the six selected, four were from Decatur township. This motion was by the court overruled, and we think properly.

"No indictment shall be quashed * * * by reason of the disqualification of any grand juror." Sec. 411, Criminal Code. None of the grounds mentioned in the motion would have justified the court in quashing the indictment, and hence it was not important that the record should have been corrected. *Fletcher v. The People*, 81 Ill. 116.

The second error assigned is that the court erred in not quashing the indictment.

It is urged that the court should have sustained the motion to quash, first, for the reasons set forth in the first assignment of error, and also for the further reason, that after the grand jury had been impaneled and commenced its work, there was an adjournment of the court for a few days, during which the judge was absent in another county holding court, and this fact, it is claimed by plaintiffs in error, suspended the functions of the grand jury, while the judge was so absent, and

all their proceedings during such absence were void. It will be observed that the adjournment was not for the term, but only temporary, such as occurs at the close of each day that the court may be in session, or for the Sabbath day, or any other occasion requiring an adjournment for some temporary purpose.

The grand jury when properly organized meets and adjourns upon its own motion, without reference to the temporary adjournment of the court, and it may lawfully proceed in the performance of its duties whether the court is in session or not.

This right to remain in session would not, of course, extend beyond the final adjournment of the court for the term, but within such limits it would be governed by its own wishes, subject to the control that the court at all times has over it.

It is next insisted that the court erred in overruling the challenge to the array of the petit jury.

In support of this motion affidavits were read showing the following state of facts in reference to the methods used for procuring the jury: At the meeting of the county board in July, 1889, the jury list was made up by each of the members presenting a list of names supposed to represent ten per cent of all the legal voters in the township or precinct represented by such member, all the names together numbering 957; that all these names were by the county clerk copied into a book kept for that purpose; that all of these names were then copied upon cards, one name on each card, and all said cards placed in a box, from which box the panel of thirty jurors required for the term was drawn. In thus proceeding, the board wholly omitted and disregarded the provisions of Sec. 2, of Chap. 78, entitled, "Jurors." This chapter provides in the first section that a list shall be made of not less than ten per cent of the legal voters, as seems to have been done in the present case.

The second section provides that the board shall from such list so prepared make a second list, by selecting from the first a number of names equal to one hundred for each trial term of the Circuit Court and other courts of record, except the

County Court, and in making this second or sub-list the board must take into consideration the following four qualifications, not required in making out the first or ten per cent list, viz., they must take such only as are:

First. Inhabitants of the town or precinct not exempt from serving on juries.

Second. Of the age of twenty-one years or upward, and under sixty years old.

Third. In the possession of their natural faculties, and not infirm or decrepit.

Fourth. Free from all legal exemptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language.

The third and fourth sections provide for the making of such list at other than the time fixed, and also for exemptions from jury duty.

The fifth section provides that the board shall check off from the ten per cent list the names of those selected to form the sub-list and the names upon such sub-list shall not be again selected as jurors until every person named upon the ten per cent list qualified to serve as a juror has been selected, or until the expiration of two years from the time of making the original or ten per cent list, when a new list shall be made.

At the expiration of two years all names undrawn in the box and also the names of those who have been drawn, but have not served upon a jury during the year for which they were selected, if qualified, should form part of the sub-list selected at that time for the ensuing year.

By the seventh section this sub-list to be selected annually from the ten per cent list, furnishes the names to be written upon separate tickets and placed in a box, and from which juries are drawn as provided in section 8.

The Supreme Court has said, "that a mere irregularity in drawing the jury, where no positive injury is shown to have been done the accused, is not sufficient cause to sustain a challenge to the array." *Wilhelm v. The People*, 72 Ill. 471; *Mapes v. The People*, 69 Ill. 523.

It therefore becomes necessary to determine whether the failure by the county board to obey or notice the section requiring a second or sub-list to be prepared is such a mere irregularity as could reasonably be said to work no positive injury to plaintiffs in error. If the language above quoted from the Supreme Court means that in all cases an accused person, who has unsuccessfully challenged the array of jurors, must, before he can successfully assign error upon the action of the court in overruling his challenge, show that some positive injury has been done him by the failure or irregularity, then any of the provisions of the jury law might be violated, and the accused could not be heard to complain.

If a jury had been selected by the sheriff to try plaintiffs in error, entirely without and against law, it might be that those selected had all the qualifications required by law, were good men, and had given plaintiffs in error a fair and impartial trial, and therefore they could not complain.

We do not understand the Supreme Court to mean this, but that the irregularity complained of must be of such a character as would probably have produced a change in the panel, or presented a list of names to choose from different from those which would be produced by a compliance with the law. It is the right of an accused to have a jury selected in compliance with the law, and any substantial and material departure from the methods pointed out by the statute is certainly a wrong to him, of which he has a right to complain.

In the Mapes case, *supra*, the error complained of was that Lee, who was an officer *de jure*, shook the box previous to the drawing of the names of the jurors instead of the county clerk, and the court say: "What possible difference could it make in the result, whether the box containing the name was "well shaken" by Lamorte or Lee?"

In the Wilhelm case, *supra*, the character of the irregularity does not appear from the opinion; it is only spoken of as one that would produce no positive injury to the accused.

The failure of the county board to select from the original or ten per cent list, the sub-list required by Sec. 2, was, we think, a substantial departure from the law which would work a positive injury to the accused.

The original list contains the names of voters without any reference to any of the qualifications of jurors required by Sec. 2, except the first, *i. e.*, that they shall be inhabitants of the town or precinct.

In making the second or sub-list, the county board are required to exercise their judgment, and to use their personal knowledge of the men of their precinct, to present names of those *only* who are of the age of twenty-one years and under sixty, in the possession of their natural faculties, not infirm or decrepit, free from all legal exceptions, of fair character, approved integrity, sound judgment, well informed, and who understand the English language.

This sifting of the original list by the members of the county board is not a mere useless form, but an important duty they owe to the public, and one which they can not omit without materially lowering the character and intelligence of those composing the juries of the county.

The failure of the county board to perform their duty, in all human probability, presented to the accused in this case, an entirely different panel of jurors from those which should have been presented, had the law been complied with. It is almost impossible to suppose that thirty names drawn from a box containing the nine hundred and fifty-seven names on the original list would be identical with those drawn from a box containing the names only of the sub-list.

The omission to observe the provisions of section 2 has, therefore, resulted in the selection of the jury from an entirely different class of men than that intended by the law, and did, in all human probability, present to plaintiffs in error different individuals to choose a jury from than would have been presented had the law been complied with.

The true rule, we think, is laid down in *Ferris v. The People*, 35 N. Y. 129, where it is said: "The question arises whether any injury has resulted to the prisoner, or has he been prejudiced thereby. If we could see that by any possibility this neglect of duty on the part of these officers *could have changed the panel* or in any manner have produced a different result, we might hesitate whether the prisoner should have a new trial."

We are of the opinion that the Circuit Court erred in not sustaining the challenge to the array of petit jurors.

The fifth and sixth errors assigned are not well taken.

The questions to be asked of jurors on their *voir dire*, and the time permitted to be occupied in examining jurors, is largely within the discretion of the court. It is quite apparent, from an inspection of the record, that counsel for plaintiffs in error were captious and dilatory, and seemingly more desirous of asking unnecessary and flippant questions of jurors than of treating the court with respect and expediting the business.

We think the court was fully justified in its rulings upon these questions.

The fourth assignment of error, as we understand it, is, that when the selection of the jury was begun there were twenty-four jurors present, ready to answer; that after thirteen of these had been excused, leaving but eleven in the box, the court ordered the sheriff to summon one juror to fill the panel of twelve in the box; whereas plaintiffs in error insist that the full panel of twenty-four should have been kept full until the jury was completed. The action of the court in this respect was not erroneous.

By Sec. 12, of Chap. 78, R. S., it is provided that in case a jury shall be required for the trial of any cause before the panel is filled, it shall be filled from the bystanders. By the term panel, as here used, is meant twenty-four jurors.

But when in impaneling the jury, the number becomes reduced, so that there are not twelve men in the jury box, Sec. 13, of the same chapter, provides for filling the panel from the bystanders, and the word, panel, as used in this section, means a panel of twelve men.

In other words, when a case is called for trial, and the regular panel of twenty-four men, is, for any cause not full, the court may order it filled from the bystanders, but after the selection of the jury has begun and this number becomes reduced so there are not twelve jurors to place in the box, the court then orders only enough to be selected from the bystanders to keep twelve men in the box, and need not keep

the original panel of twenty-four full. This, we understand, was the course pursued by the court, and was, in our opinion, the proper method.

Because of the error of the court, in overruling the challenge to the array of the petit jury, the judgment of the Circuit Court will be reversed and the cause remanded for a new trial.

Reversed and remanded.

THE DWELLING HOUSE INSURANCE COMPANY
V.
HENRY BAILEY ET AL.

Fire Insurance—Note for Premium—Fraud in Procuring.

Where the agent of an insurance company fraudulently writes a note above the signature of a person who signs what he supposes to be an application for insurance, it is void while in the hands of said company although the person signing might be guilty of such carelessness in not ascertaining what he was signing, as would make him liable to a *bona fide* assignee before maturity.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Moultrie County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. I. D. WALKER, for appellant.

Messrs. EDEN & COCHRAN, for appellee.

CONGER, P. J. This case is similar in most respects to that of appellant against Downey, 39 Ill. App. 524.

Appellee signed, as he supposed, an application for insurance, but, in fact, signed his name at the bottom of a blank note attached to and at the bottom of the application, which note was afterward filled up by the agent of appellant who

Dwelling House Ins. Co. v. Bailey.

took the application with knowledge at the time, that appellee did not intend to sign a note or paper which should afterward be transformed into a note. Under such circumstances, while the paper is in the hands of appellant, appellee can successfully resist its payment.

Appellant's counsel make the point that appellee could read and was guilty of gross carelessness in not reading and understanding the paper before he signed it.

In Mead v. Munson, 60 Ill. 49, and in Taylor v. Atchison, 54 Ill. 196, it is held that, when a note has been indorsed before maturity, the maker, before he can sustain the plea of fraud and circumvention, must show that he used reasonable and ordinary prudence to protect himself from imposition. But in the latter case the court say: "As to the payee, it may be otherwise."

Appellee did not sign the note in suit, nor did he intend to sign any note, and we have no hesitation in holding that, when appellant or its agent fraudulently and wrongfully wrote a note above appellee's signature, it was void while in the hands of appellant, although appellee might be guilty of such carelessness in not ascertaining what he was signing as would have made him liable to a *bona fide* assignee before maturity.

Although the questions of fact were contested quite sharply, yet, we see no good reason for interfering with the conclusions reached by the jury, and believing that justice has been done by their verdict, the judgment of the court below will be affirmed.

Judgment affirmed.

39	400
83	496

WILLIAM E. MCCRORY

V.

JAMES HAMILTON, FOR USE, ETC.

Replevin—Bond—Action of Debt—Sec. 123, Chap. 3, R. S.—Survivorship—Sale—Judgment.

1. Under Sec. 123, Chap. 3, R. S., an action of replevin survives, and such survivorship applies in case of the death of the defendant as well as that of the plaintiff.

2. A judgment in such case, not that the property be returned to the defendant, but that he have a writ of *retorno habendo*, while informal is not so defective as to be regarded as a nullity.

3. The mere fact that witnesses may use the terms sell or sale, or that the parties to a given transaction used such terms, does not operate to make the same a sale, if upon consideration thereof it appears there was none.

4. In an action of debt upon a replevin bond, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand.

[Opinion filed January 24, 1891.]

APPEAL from the County Court of Coles County; the Hon. L. C. HENLEY, Judge, presiding.

Messrs. FRYER & NEAL, for appellant.

Messrs. F. K. DUNN and JAMES W. CRAIG, for appellee.

WALL, J. This was an action of debt on a replevin bond. The replevin suit was brought October 16, 1883, by F. F. Randolph against Robert Kane for a quantity of barrel staves and heading valued at \$400. The writ was executed by replevying the property and delivering it to the plaintiff.

The defendant died pending the suit and his administrator was made a party in his stead and at the September term, 1887, the suit was dismissed for want of prosecution. The property not having been returned the present action was brought, resulting in a judgment of \$589.75 in favor of the plaintiff therein, from which an appeal is prosecuted to this

McCrory v. Hamilton.

court by defendant McCrory, who was the surety on the bond. The first point made in behalf of the appellant is, that upon the death of Kane the replevin suit abated and could not be revived against his administrator.

By Sec. 123, Chap. 3, R. S., it is provided that in addition to the actions which survive at common law the action of replevin (and others named) shall survive. But counsel urges that means merely that it shall survive only in favor of the representatives of the plaintiff, the injured party. In *Wehr v. Brooks*, 21 Ill. App. 115, we held that the provision of the statute is not so limited and we see no occasion to depart from that ruling.

It is next urged that the judgment in the replevin suit is not sufficiently formal and that it is not in terms a judgment that the property be returned to the defendant, as alleged in the declaration, but merely that the defendant have a writ of *retorno habendo*.

The objection is, as we think, not substantial. While the judgment is somewhat informal, yet it is not so defective as to be regarded as a nullity. In effect it is an adjudication of cost against the plaintiff and that the property be returned to the defendant. We are not inclined to the very technical view suggested by appellant and must overrule the objection.

Certain objections to the action of the court in admitting and excluding evidence are also considered not well taken, and as we think they are not important in the view we take of the merits of the case, they need not be discussed. The main question presented arises upon the evidence and the conclusion to be drawn from the standpoint of the appellee. The proof shows that Kane was a cooper and that Randolph was a miller; that Randolph delivered a lot of the staves and heading, of which the property replevied was a part, to Kane, from which Kane made and was to make flour barrels to be delivered to Randolph; that the material was mostly worked up in this way when Randolph gave notice to Kane that he would need no more barrels and demanded the staves and heading then on hand, which demand not being complied with the replevin suit was brought. The evidence is conflicting as to

the terms of the arrangement, it being contended on the part of Randolph that the staves and heading were always his property and that Kane was to be paid for his work at eighteen cents per barrel; while, as Kane contends, the staves and heading were sold to him and became his absolute property at certain rates named, and that he was to pay for the same in barrels at certain prices named for barrels of ten and twelve hoops respectively.

It was evidently made a question before the jury upon which the case was supposed to hinge, whether the material was sold to Kane or whether it always continued the property of Randolph. If the latter, then it seems to be conceded that no more could be recovered in this suit than the amount of whatever was due to Kane for the work done by him when the demand was made; but if he purchased the property it is assumed that the value of what was replevied may be recovered without regard to the fact that it was not fully paid for.

It seems quite clear that though the form of the transaction may have been an agreement to sell the materials to Kane at certain rates and that he should sell the barrels to be made out of it back to Randolph at certain prices, yet it was not in any proper sense a sale of property on either side as that term is usually understood.

It was rather a delivery for the special purpose of making up into barrels which were to be delivered to Randolph. Had Kane refused to do this or had he sold or disposed of the property in any other way he would have broken his contract with Randolph. The mere fact that the witnesses may use the terms sell or sale or that the parties may have used them, will not make it a sale when, upon a consideration of the whole matter, it appears that there was no sale.

We can not believe that it was intended by the parties to change the general ownership of the property, and while Kane may have been and was invested with a special ownership or interest, it was for the purpose and upon the express trust that he would do certain work upon it and return it. He was to be charged with it at certain prices and was to be

Hess v. Keiser.

credited with certain prices upon what he was to return. It is a misuse of terms to call this a sale on either side.

Kane had a lien for any balance due him for the work done, and if Randolph improperly prevented him from manufacturing the rest of the material, he was also entitled to fair compensation for damages thereby sustained and his lien would include that item also; but we are of the opinion that this is the full extent of his demand, in any event, even accepting the testimony offered by the appellee as the true version of the matter. The judgment must therefore be reversed and the cause remanded.

Reversed and remanded.

CONRAD HESS
V.
HENRY KEISER.

Sales—Joint Liability as Partners—Evidence.

In an action brought to recover for articles sold, this court holds, in view of the evidence, that a person named was not liable as a partner of the purchaser, and that the judgment for the plaintiff can not stand.

[Opinion filed January 24, 1891.]

APPEAL from the County Court of McLean County; the Hon. C. D. MEYERS, Judge, presiding.

Mr. E. P. HOLLY, for appellant.

Messrs. KERRICK, LUCAS & SPENCER, for appellee.

CONGER, P. J. This was an action brought by appellee before a justice to recover a bill amounting to \$12.95 for machine supplies sold to Peter Hess, who, during the summer

and fall of 1889, operated a threshing machine in the vicinity of Bloomington, Illinois, where the appellee did business.

Appellee brought his action against both Peter Hess and appellant, his father, on the ground they were jointly liable.

The only evidence of joint liability was the introduction of the notes and chattel mortgage given to secure the payment for the threshing machine, they all being signed: "Peter Hess, Conrad Hess," and a property certificate signed by Conrad Hess upon the back of these notes.

Conrad Hess, Peter Hess and D. B. Harwood, the latter the agent who sold the threshing machine, all testify that Conrad Hess was not a partner of his son, but only surety upon the notes given for the purchase money. Appellee then called William Shaffer, a justice of the peace, and proved by him that one Fred Jerke obtained a judgment before him against Peter and Conrad Hess for wages earned when working with the machine and on the farm of Conrad Hess. This was the entire evidence as to partnership or joint liability.

Appellee testified that he sold the supplies to Peter Hess; that he charged them on his books to Peter Hess; that at the time of the sale he did not know that he had a partner; that some time after the sale of the supplies somebody told him that he could also hold Conrad Hess; that Conrad Hess had never done anything prior to the sale to lead him to believe that he was a partner; but at the time of the sale he thought he had to collect his bill of Peter Hess alone. Notwithstanding this unqualified statement of appellee, the court gave the following instruction, viz.:

"The court instructs the jury that although they may believe from the evidence that the defendant, Conrad Hess, was not a partner and owner of the threshing machine with his son, Peter Hess, yet if the jury believe from the evidence that he held himself out to the world, and acted and conducted himself as a partner in and about the management and running of the threshing machine, and that while he was so holding himself out as a partner, the plaintiff furnished the labor or materials sued for in this case, relying upon such partnership, then the jury should find for the plaintiff and against the defendant, Conrad Hess."

L. E. & W. R. R. Co. v. Christison.

This was error. Under his statement appellee could not recover except he could show that an actual partnership existed. This he utterly failed in doing. The judgment of the County Court will be reversed and the cause remanded.

Reversed and remanded.

LAKE ERIE & WESTERN RAILROAD COMPANY

v.

CHRIST CHRISTISON.

39	495
97	1574

Railroads—Ejection of Passengers—Damages—Practice—Discretion of Trial Courts—Evidence—Instructions—Practice.

1. In an action for tort where the averments of the declaration are divisible, the plaintiff may recover upon proof of enough to make a cause of action.

2. In such case mere surplusage will not vitiate, but where some statement on the subject is necessary and it can not be wholly rejected, a variance or failure to prove as laid is fatal.

3. Punitive damages are admissible where the injury is wantonly inflicted, and are visited upon the wrongdoer by way of mere punishment, regardless of the amount of damages actually sustained.

4. The indignity suffered by reason of the unlawful act of another is a proper subject of compensation whether the act was wanton, malicious or wilful, or whether it was merely negligent or mistaken.

5. What the indignity is in a particular case is a question of fact for the jury.

6. It is proper to refuse to repeat, or absolutely refuse an instruction where the same contains elements calculated to mislead or confuse the jury.

7. In an action brought for the recovery of damages for the alleged wrongful ejection of plaintiff from a railroad train, this court holds, in view of the evidence, that the trial judge was guilty of no abuse of discretion during the trial thereof in the court below; that there was no error in the giving or refusing of instructions, and declines to interfere with the judgment for the plaintiff.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Ford County; the Hon. A. SAMPLE, Judge, presiding.

Mr. MILTON H. CLOUD, for appellant.

Messrs. COOK & MOFFETT, and A. L. PHILLIPS, for appellee.

WALL, J. This was an action on the case for damages accruing to the plaintiff on account of being put off a train on the defendant's railroad. The plaintiff recovered a judgment for \$75, from which the defendant has prosecuted an appeal to this court.

The plaintiff alleges that he applied to the ticket agent for a ticket from Gibson to switch D., and that the agent refused to sell him a ticket but assigned no reason for such refusal; that he then got upon the train after having learned from the conductor that it would stop at said station; that the conductor required him to pay ten cents extra for having no ticket, which he refused to do, and then the conductor stopped the train and told him to get off at a point about one-third of a mile from the station house at Gibson. The contention of the defendant is that the plaintiff got off voluntarily and without any force or even a request to do so from the conductor.

The occasion was a dark, rainy night on the 30th of May, 1889, and while the plaintiff was subjected to no very serious loss or inconvenience, yet the matter was one of some annoyance, and was an invasion of his rights, if the facts were as he stated.

The only substantial point of fact in dispute was whether the plaintiff left the train voluntarily, or whether he was ordered off and yielded to the authority of the conductor. The evidence is in conflict, but there is sufficient to support the finding, and as this is the third verdict to the same effect as we learn from the briefs, we should be disinclined, even were the proof less satisfactory, to reverse the judgment upon this ground. It is objected by appellant that the court erred in allowing the plaintiff to ask his own witness Nagle whether he had not made a certain statement out of court.

The question was evidently asked for the purpose of refreshing the memory of the witness but it resulted in eliciting

ing nothing of importance, and it is clear that no harm was done to the defendant even assuming that the question was irregular. This, however, is a matter very much in the discretion of the court, and it does not seem that the discretion was abused.

It is next urged that the court made an improper remark in the presence of the jury.

This alleged impropriety occurred during the cross-examination of the plaintiff as to what he had testified on a former trial, and when a certain question was asked to which the plaintiff objected the court said: "I don't see that there is any contradiction in that between what he then testified and what he now says," meaning, as we understand, that the question did not imply a contradiction, however it might be answered, and therefore sustained an objection to it. The cross-examination as to what the plaintiff formerly testified had already been quite protracted, and we can not see that the discretion of the court was improperly exercised in declining to permit it to be continued, or that the remark just quoted could have had any particular effect upon the jury.

It is also urged that the court erred in giving instructions for the plaintiff, the first objection being that the instructions permitted a recovery upon less evidence than was necessary to support all the averments of the several counts to which the instructions were applicable. In actions for tort where the averments of the declaration are divisible, the plaintiff may recover upon proof of enough to make a cause of action. The instructions referred to are not subject to objection in this respect. They embodied all that was necessary to constitute a cause of action even though they may have omitted some immaterial matters averred in the declarations, such as an offer to pay for a ticket which plaintiff was then applying for and the like. "In torts the plaintiff may prove a part of his charge if the averment is divisible and there be enough proved to support his case." 1 Ch. Pl. 387.

The authority cited by appellant is not in point, as in that case the averment in question was deemed essential, and as it

could not be wholly rejected, it was necessary to prove it as laid. Mere surplusage will not vitiate, but where some statement on the subject is necessary, and it can not be wholly rejected, a variance or failure to prove as laid is fatal. Here the omitted matters were not essential and the averments were divisible.

It is objected to the instructions, secondly, that the court advised the jury in substance that if the defendant was liable, the plaintiff was entitled to recover not only the actual damages sustained, but damages for the indignity he suffered, if any such was shown by the evidence, and that in this there was error, because damages for indignity are punitive in their nature, and whether punitive damages are allowable is for the jury, a plaintiff never being entitled to merely punitive damages as a matter of right. Punitive damages are admissible where the injury is wantonly inflicted, and are visited upon the wrongdoer by way of mere punishment, regardless of the amount of damages actually sustained. The indignity suffered by reason of the unlawful act of another is a proper subject of compensation whether the act was wanton, malicious or wilful, or whether it was merely negligent or mistaken.

The suffering thereby occasioned is not to go unrequited, however, because there is no improper motive or purpose, and is a ground of damage quite apart from the matters which distinctly give rise to punitive or vindictive damages.

In *Penn. Co. v. Connell*, 112 Ill. 305, it was conceded and assumed that one unlawfully ejected from a train was entitled to "reasonable damages for the indignity."

What the indignity is in the particular case must be a question of fact for the determination of the jury.

We think there was no error in the action of the court giving instructions for the plaintiff, nor do we find error in the refusal to give certain instructions asked by defendant. As is frequently observed, the proper and material portions of those refused will be found sufficiently for all purposes in those given for the defendant. It is not error to refuse to repeat, or to refuse where the instruction contains elements

Purcell v. Town of Bear Creek.

calculated to mislead or confuse the jury. The last point urged in the brief that the verdict is against the evidence has been already considered in connection with others except as to the amount of damages allowed. According to the evidence of the plaintiff, he was unlawfully ejected from the train and was entitled to recover therefor; and while the amount of actual injury sustained was very slight, yet as we have indicated the jury had the right to allow a reasonable sum for whatever indignity was thereby occasioned. We are not prepared to say that the amount allowed is so high as to indicate passion or prejudice as a necessary conclusion, and we do not feel required to interfere on that ground. Finding no substantial error in the record, the judgment will be affirmed.

Judgment affirmed.

EDWARD PURCELL ET AL.
V.
THE TOWN OF BEAR CREEK.

Principal and Surety—Town Supervisor—Action on Bond of—Sec. 102, Chap. 139, Starr & C. Ill. Stats.—Levy by Auditor.

1. The fact that under the terms of the bond of a township supervisor, he is required merely to perform his official duties "to the best of his skill and ability," will not excuse him for a misapplication of money. He must be held to know the law, and if in doubt, must obtain an adjudication that will protect him.

2. A board of town auditors has no power, under any circumstances, to ratify an illegal appropriation of town funds, and such ratification can not bind the town.

3. The payment of taxes irregularly levied amounts to a ratification, and such irregularity can not justify the keeping or misapplying of the money so raised, by a township supervisor.

4. In the case presented, this court holds that the amount in question was wrongfully paid to the county treasurer by the township supervisor, and that the judgment for the plaintiff in an action on the official bond of such officer can not be interfered with.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Christian County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. A. THORNTON and J. C. McBRIDE, for appellants.

Messrs. W. M. PROVINE and J. G. DRENNAN, for appellee.

WALL, J. This was an action of debt on the official bond of Purcell, as supervisor of the town of Bear Creek. The case was tried by the court, a jury being waived, and judgment was rendered for the plaintiff for the penalty of the bond to be discharged on payment of \$1,382.82 and costs of suit.

The material facts in the case are, that the town of Bear Creek, on the 31st of December, 1881, issued its bonds, ten in number, for \$1,000 each, due ten years after date, with the option of paying at the end of any year after two years, and registered the same in the office of the auditor of public accounts, which bonds were issued to refund certain indebtedness incurred by the town in aid of a railroad; that on the 1st of September, 1885, the board of town auditors levied a tax to pay two of the bonds, Nos. 5 and 6, the prior numbers having been paid in the same way; that said levy was certified to the county clerk, by the clerk extended on the tax books, was collected by the town collector, by him paid over to Duncan, who was then supervisor, by him paid to Purcell, his successor, and by him paid to White, the county treasurer.

Appellant contends that the board of town auditors had no right to make the levy, that the supervisor had no right to receive the money and that in any event his payment of it to the county treasurer was a full discharge of his liability in respect thereto.

The main point made by appellant seems to be that the power to make a levy for the payment of these bonds was vested in the auditor of public accounts and not in the township authorities. From an examination of the statutory provisions cited by counsel, we are unable to say that the auditor is authorized to make such levy in any case except where the obligation has matured and there is a present liability of the

town therefor. Where the town is not yet bound to pay but seeks merely to exercise its option to do so, there seems to be no authority conferred upon the auditor to take any action whatever.

It is urged, however, that if this be so, and if, in any event, the board of town auditors might make such levy, it was a prerequisite that the town, by a vote of the electors at a regular town meeting, should have declared in favor of exercising the privilege of paying before due, and that the town officers constituting the board had no power to thus act for the electors.

We are disposed to hold that the supervisor can not be heard to make this objection after having received the money.

Conceding that the electors might object to such action of the board and might refuse to abide by it, yet if they ratify it in the very practical way of paying the tax so levied, there is but a mere irregularity which could not be pleaded by the supervisor as a justification for keeping or misapplying the money so raised.

If, then, the tax was levied properly or must be so regarded in this instance, was it properly paid over to the supervisor by the town collector?

By Sec. 102, Chap. 139, Starr & C. Ill. Stats., it is provided:

“The supervisor shall receive and pay out all moneys raised therein for defraying town charges and he shall prepare and file with the town clerk a full statement of the financial affairs of the town, showing the amount of tax levied the preceding year for the payment of town indebtedness and charges, the amount paid out by him including amount paid out on town indebtedness, specifying the nature and amount of said indebtedness and the amount paid thereon, how much on principal and how much on interest account; the amount and kind of all outstanding indebtedness due and unpaid, and the amount and kind of indebtedness not yet due and when the same will mature.”

The question arises whether the payment of these bonds, under the circumstances here disclosed, is a town charge.

The liability of the town for the bonds is not disputed nor

is it disputed that the town had the right to pay after the expiration of two years and before the expiration of ten years when it could be compelled to pay. For the purposes of this case it may be assumed that the town has availed itself of this right and it must follow that it has the power to do what is necessary to that end.

It seems reasonably clear that a town charge thereby arises and that the money to defray it must, in the absence of any statutory provision specifically directing otherwise, be paid to the supervisor and by him should be paid out upon the debt.

We find no statutory provisions requiring or authorizing the supervisor to pay to the county treasurer and such payment would therefore constitute no defense.

It is urged that the board of town auditors approved the report of the supervisor showing that the money was paid to the treasurer and thereby the payment was rendered valid. The board had no power under any circumstances to ratify an illegal appropriation of town funds and their action in this respect does not bind the town.

Finally, it is urged that the bond sued on is not in the statutory form and that it merely requires the supervisor to perform his official duties "to the best of his skill and ability."

Whatever qualification may be implied by this phrase in respect to the obligation assumed, it can not excuse the officer for a misapplication of the money. He is presumed to know the law and if he was in doubt he could easily have obtained an adjudication that would have protected him.

We are of the opinion the judgment is responsive to the merits and it will be affirmed.

Judgment affirmed.

Town of Rushville v. President, etc., of Rushville.

THE TOWN OF RUSHVILLE
v.
THE PRESIDENT AND TRUSTEES OF THE TOWN OF
RUSHVILLE.

39	503
52	42
39	503
61	91
39	503
71	326
39	503
p90	623

Municipal Corporations—Recovery of Money by—Privity—Payment.

1. Where one receives money which he is not entitled to retain, the law will, in proper cases, raise an implied promise to repay it to him from whom it came, but there is no such implied promise to perform a duty in respect to it which never rested upon him, but did rest upon the other, to pay to a third party.

2. In such case a party is not compelled at his peril to determine where the money should have gone in the first place, but when satisfied it is not his, he may clear himself of all responsibility by returning it to him from whom he received it, and to whom alone he is accountable.

3. In view of the evidence, this court reverses the judgment for the plaintiff in an action brought by one municipality against another to recover certain money collected for taxes.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Schuyler County; the Hon. J. J. GLENN, Judge, presiding.

Messrs. W. L. VANDEVENTER and S. B. MONTGOMERY, for appellant.

Messrs. PRENTISS & BAILEY and L. A. JARMAN, for appellee.

WALL, J. This was an action of assumpsit by the appellees against the appellant, in which the judgment was in favor of the former for \$1,047.40. The appellees, a corporation under a special charter granted in 1869, is contained territorially in part within the boundaries of appellant.

Certain money derived from taxes collected for road and bridge purposes by the collector of the township from property within the corporate limits of appellee, was paid by the

VOL. 39.] Town of Rushville v. President, etc., of Rushville.

collector; one-half to the treasurer of appellee and the other half to the treasurer of the highway commissioners of appellant.

The appellee claiming that all the money thus collected was, by the terms of the charter, payable into its treasury, brought this suit to recover the sum thus realized by appellant.

We have heretofore held that the provision of the charter of appellee in respect to the proceeds of the road and bridge tax on property within its bounds, was not abrogated by the act of 1883, and that appellee was entitled to the whole of said tax, and we see no occasion to recede from the position then taken. See 32 Ill. App. 320.

Assuming that the collector erroneously paid one-half of the collection to appellant and that he should have paid it all to the appellee, the question arises whether the appellant can be required to pay it to appellee.

We think not. There is no privity. The mere fact that the collector paid the money to appellant does not discharge him from his duty to pay it to appellee. He is still the debtor of appellee to that extent, but appellant need not answer appellee in regard thereto. It may, perhaps, be required to refund to the collector, but it is under no promise or duty to appellee.

Where one receives money which he is not entitled to retain, the law will, in proper cases, raise an implied promise to repay it to him from whom it came, but there is no such implied promise to perform a duty in respect to it which never rested upon him, but did rest upon the other, to pay to a third party.

He is not compelled, at his peril, to determine where the money should have gone in the first place; but, when satisfied it is not his, he may clear himself of all responsibility by returning it to him from whom he received it, and to whom alone he is accountable.

The plaintiff's theory is, that the money was received by the defendant for the use of the plaintiff; but the fact is, that the defendant received it under circumstances indicating, not that it was for the plaintiff's use, but rather for its own. In 2

Town of Rushville v. President, etc., of Rushville.

Greenleaf on Evidence, Sec. 119, it is said that where money is placed in the hands of a defendant to be paid over to a third person, which the defendant agrees to do, such third person may sue for it as money had and received to his use; "but if the defendant did not consent to so appropriate it, it is otherwise, there being no privity between them, and the action will lie only by him who placed the money in his hands." In the present case, the money was paid, no doubt, under the impression that it rightfully belonged to defendant, and the facts rebut any suggestion that the defendant was receiving it for the plaintiff's use.

In *Butterworth v. Gould*, 41 N. Y. 450, certain money was due under a contract between the plaintiff and the Postmaster General of the United States, for carrying the mails; and a portion thereof, for which the action was brought, was paid to the defendant by the treasurer of the United States. Such payment was made after adverse claims on the department by the plaintiff and defendant, respectively. It was held the defendant was not liable to pay it to the plaintiff, and the court, quoting from the opinion in the former case of *Patrick v. Metcalf*, 37 N. Y. 332, said: "Where two claimants for the same service apply for payment to the party bound to pay the same, one of whom is recognized as the person entitled to payment, and is paid to the exclusion of the other, who is in fact entitled to payment, the party so excluded derives no right, from the circumstances, to the money paid to his competitor. It is not money received to his use, for payment thus made does not in any respect affect his right still to call on his debtor for payment to himself, and it makes no difference whether such debtor is an individual or the government."

To the same effect is *Sergeant v. Stryker*, 1 Harrison, 464, where a sheriff had paid a reward for the apprehension of an escaped prisoner to the defendant, who was not entitled to it, and was sued therefor by the plaintiff, who had really apprehended the fugitive.

So in *Moore v. Moore*, 127 Mass. 22, where the defendant's intestate had received money as his own from an execu-

tor, who paid it under a mistaken interpretation of his testator's will, it was held he was not liable therefor to the plaintiff to whom the executor should have paid it. A similar ruling will be found in *Rand v. Smalledge*, 130 Mass. 367.

In *Trumbull v. Campbell*, 3 Gilm. 502, the plaintiff sought to recover money paid the defendant by the State, which the plaintiff claimed the State should have paid him for certain services, and it was held he could not recover. So it was ruled in *Hall v. Carpen*, 27 Ill. 386, and *Carpen v. Hall*, 29 Id. 512, where the plaintiff and defendant had each sent cattle to market, which were sold by the same broker, who in accounting with the parties paid the defendant too much, and the plaintiff precisely the same amount too little. The same principle is announced in *Neill v. Chesson*, 15 Ill. App. 267, and in *Atteberry v. Jackson*, 15 Ill. App. 276.

We are of opinion no right of action appears herein, and the judgment will therefore be reversed. The cause will not be remanded.

Judgment reversed.

D. E. CARBERRY

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Criminal Law—Pharmacists—Failure to Take Out License—Practice.

1. An act in derogation of common right must be strictly construed so far as it places restraint upon any useful and lawful calling.

2. Where a pharmacist entitled to registration pays his fee, he is entitled to proceed in his business until the expiration of the year, and he can not be held liable in a criminal prosecution because of the non-action of the board of pharmacy in issuing certificate.

[Opinion filed January 24, 1891.]

IN ERROR to the Circuit Court of Piatt County; the Hon. C. B. SMITH, Judge, presiding.

Mr. C. F. MANSFIELD, for plaintiff in error.

Mr. JAMES HICKS, State's Attorney, for defendants in error.

WALL, J. The plaintiff in error was prosecuted for a violation of Sec. 12 of the act to regulate the practice of pharmacy, the charge being that the defendant "was guilty of putting up and preparing a prescription," and that he "did not then and there have a license as required by law." The prosecution originated before a justice of the peace, where the defendant was fined \$50, from which judgment he appealed to the Circuit Court, where the case was submitted to the court, a jury being waived, upon an agreed state of facts. The court found him guilty and imposed a fine of \$50. By writ of error the record is brought here. It appears that the plaintiff in error was engaged in the business of a dispensing pharmacist, and was by the act entitled to registration upon payment of the fee to be fixed by the board of pharmacy under Sec. 9. By successive payments of such fee he renewed his registration from year to year until 1888, when he omitted it, and in August of that year he was fined \$50 for failing to renew. He paid said fine, and at the same time paid the renewal fee for the year ending June 30, 1889. This renewal fee should have been paid on the 30th of June, 1888. On the 31st of December, 1888, he paid the renewal fee for the year then ensuing, the board having changed the time of renewing from June to December. No certificate of renewal was sent him until August, 1889, seven months or more after the payment of the renewal fee; and the certificate then furnished was in terms for the residue of the year ending December 31, 1889. The present prosecution was for compounding and selling a prescription in May, 1889, which was during the time for which he had paid his renewal fee in December, 1888.

We are of the opinion that the defendant was guilty of no offense, and that the fine was improperly imposed. He was entitled to registration upon payment of the renewal fee. Sec. 10 provides that every registered pharmacist who desires to continue the practice of his profession shall annually,

during the time he may continue in such practice, on such date as the board may fix, pay a registration fee for which he shall receive a renewal of registration. Notwithstanding his neglect to pay at the proper date in June, 1888, he did not forfeit his right to renewal by a subsequent payment, good for the remainder of the year; and by the payment in December he was entitled to registration for the year ending December, 1889. The mere fact that the board was dilatory in issuing the certificate could in no wise prejudice him. He had done all that was required of him, and was not bound to close his store until the certificate should reach him. The act is in derogation of common right and must be strictly construed so far as it places restraint upon a useful and lawful calling. There are thousands of pharmacies in the State where prescriptions are constantly presented, and it would be intolerable if all of these or any of them should be compelled to suspend business because the board had failed to send its certificates of renewal. In the very nature of things it would be impossible for all of these renewals to be furnished at the time of paying the fee, all payments being due the same day. The fair and reasonable construction must be that where one who is entitled to registration pays the fee, and has thereby done all in his power, he is protected, and may safely proceed in his business until the expiration of the year. The certificate in such case is merely evidence of his complying with the law, but it is not the only evidence. Strictly speaking there is no such offense as that set out in the complaint, viz., compounding and selling without license. The offense is carrying on the business without being registered; and where one has paid the fee, and thereby perfected the right to registration, he can not be held liable in a criminal prosecution because of the non-action of the board of pharmacy.

The judgment will be reversed and the plaintiff in error will be discharged.

Judgment reversed.

Mut. Accident Ass'n of the Northwest v. Tuggle.

THE MUTUAL ACCIDENT ASSOCIATION OF THE NORTH-
WEST

V.

EMMA A. TUGGLE.

Life Insurance—Mutual Benefit Association—Certificate of Membership—Action on—Conditions—Accident—Overdose of Poison—Practice Act—Sec. 24.

1. It should not be assumed because of the failure of a court to discuss a certain clause in an insurance policy, the basis of a given action, that the same was overlooked.

2. A death from an overdose of laudanum, taken by mistake, is within a clause in a policy of insurance limiting its liability to "injuries received by or through external, violent and accidental means."

3. A defendant seeking to raise a point touching a declaration, which might be obviated by amendment, should be required to specifically state it and should not demur generally.

4. This court will not reverse a case on a question which the trial court did not decide, and which, had it been presented thereto, might have been obviated.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of McDonough County;
the Hon. C. J. SCOFIELD, Judge, presiding.

Messrs. ALBERT H. VEEDER and MASON B. LOOMIS, for
appellant.

Messrs. HARRIS & MICKEY and PRENTISS & BAILY, for
appellee.

We submit that the accidental swallowing of an excessive quantity of a deadly drug which produced death, as charged in the third count of the plaintiff's declaration, was a bodily injury received by or through external, violent and accidental means, within the meaning of this policy. *Paul v. Travelers Ins. Co.*, 45 Hun, 313; *Paul v. Travelers Ins. Co.*, 121 N. Y. 472; 20 N. E. Rep. 347; *McGlinchey v. Fid. & Cas. Co.*, 80

VOL. 39.] Mut. Accident Ass'n of the Northwest v. Tuggle.

Me. 251; 14 Atl. R. 13; U. S. Mut. Acc. Ass'n v. Newman, 3 S. E. Rep. 809; Trew v. Railway Co., 7 Jur. (N. S.) 878; Reynolds v. Ins. Co., Law T. (N. S.) 820; Winspear v. Acc. Ins. Co., 43 L. J. Rep. (N. S.), 459; Martin v. Travelers Ins. Co., 1 Foster & Finl. 505.

That fact, however, is expressly alleged in the declaration and admitted by the demurrer in this case.

The provision in the policy, that benefits thereunder should not extend to any bodily injury, of which there should be no external or visible sign, applies only to injuries not causing death, for which the policy provides for the payment of weekly benefits; and that the dead body is external and visible sign enough in case of death. Mallory v. Travelers Ins. Co., 47 N. Y. 52; Paul v. Travelers Ins. Co., 112 N. Y. 472; McGlinchey v. Fidelity & Casualty Co., 80 Me. 251.

In Paul v. Travelers Ins. Co., 112 N. Y. 472 (20 N. E. Rep. 347), the policy was similar to that in the case at bar, in indemnifying against injuries caused by external, violent and accidental means. The insured died from inhaling illuminating gas. He was found dead in his room, the gas being turned on and the room being filled with gas, and he lay on his bed like a man asleep, without any outward indications that he was dead, and without any external or visible signs of injury upon his body. The company was held liable; and see Trew v. Railway Co., 7 Jur. (N. S.) 878; Reynolds v. Insurance Co., 22 Law T. (N. S.) 820; McGlinchey v. Casualty Co., 14 Atl. Rep. 13.

The case of Hill v. Insurance Co., 22 Hun, 187, cited by appellant, was that of a physician's death from drinking by mistake water from a goblet in which was some poison. It was held by a divided court that the injury was not effected through external and violent means within the meaning of similar provisions of a policy. We can not approve of the reasoning of the court and agree with the general term opinion in this case, that the rule there laid down was too strict. In McGlinchey v. Casualty Co., 80 Me. 251, 14 At. Rep. 13, the Supreme Court of Maine held similar views of construction of an accident policy, and rested among other authorities upon the general term opinion in this case.

Mut. Accident Ass'n of the Northwest v. Tuggle.

It has been held that an insane man who takes his own life, dies from an injury produced by external, accidental and violent means. *Insurance Co. v. Crandall*, 120 U. S. 527; 7 Supreme Court Reports, 885.

The same result follows when death ensues from accidental drowning. *Trew v. Insurance Co.*, 6 Hurl. & N. 845; *Winspear v. Insurance Co.*, 6 Q. B. Div. 42.

Accidentally inhaling coal gas, causing death, entitles a recovery upon a policy like the present. *Paul v. Insurance Co.*, 45 Hun, 313.

A death from blood poisoning, produced by virus communicated to the hand by a fly, comes within the terms of such a policy. *Bacon v. Association*, 44 Hun, 599.

The latter case has been criticized upon the point whether the means in that instance were violent or not.

In *Insurance Co. v. Burroughs*, 69 Pa. St. 43, the court says: "If the injury be accidental, and the result is death, what matters it whether the injury is caused by a blow from a pitchfork, or a strain in handling it?" In these cases it was held that the true cause of the death came from the outside—were external means. Upon principle, we think, the same decision must be reached here.

In the cases of *Trew v. Assurance Co.*, 5 Hurlst. & N. 211, and on appeal 6 Hurlst. & N. 839, 7 Jur. (N. S.) 878; *Reynolds v. Accidental Ins. Co.*, 22 L. T. (N. S.) 820, and *Winspear v. Accident Ins. Co.*, 42 L. T. (N. S.) 90; 43 L. J. Rep. (N. S.) 459, affirmed 6 Q. B. D. 42, it was held that death from drowning was caused by external and violent means within the meaning of an accident policy. In the *Trew* case, which is the leading case, and is followed by the others, it was argued for the defendant that "whereas, from the action of the water there is no external injury, death by the action of the water is not within the meaning of the policy." To which the court reply: "That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house or overboard from a ship, and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would

VOL. 39.] Mut. Accident Ass'n of the Northwest v. Tuggle.

be excluded from the policy, and the effect would be that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give these policies a construction which will defeat the protection of the assured in a large number of cases." Hurlst. & N. 843.

In the late case of U. S. Mut. Acc. Ass'n v. Newman, in the Court of Appeals of Virginia, 3 S. E. Rep. 809, the insured died from inhaling coal gas. He was found dead in his bed and the room was full of coal gas. But the court sustained a judgment against the insurance company. There can be no question, we submit, under these authorities, that the injuries which occasioned the death of Charles W. Tuggle "were received by or through" external and violent means within the meaning of the policy. They establish as the proper construction of these words in the policy, as stated by the Court of Appeals in Paul v. Travelers Ins. Co., that "the fact that a death is the result of an accident, or is unnatural, imports an external and violent agency as a cause." Gas, water, the running away of a horse, from which by reason of fright or otherwise, death results, or a deadly drug, are equally external and violent means.

WALL, J. This was an action of assumpsit upon a certificate of membership in the defendant company.

A demurrer to the declaration was overruled and the defendant not answering further, judgment was rendered for \$5,000.

The first point made is, that by the terms of the certificate there was not an absolute promise to pay \$5,000, or any definite amount, but to pay the sum of \$2 for each member of division A of the association, which sum was not to exceed \$5,000. The demurrer was general, no specific objection being pointed out. The declaration set out the certificate *in hæc verba* and averred the death of the assured, etc., and alleged that by reason of the premises, the plaintiff was entitled to receive said sum of \$5,000, but did not allege that division A contained any particular number of members.

The objection was one that might have been obviated by amendment.

Whether such a defect might have been reached by special demurrer only at the common law, we are of opinion that under the operation of Sec. 24 of the Practice Act, and in analogy to the liberal policy there indicated, it could not be reached by general demurrer, and that a defendant seeking to raise a point so easily met by amendment should be required to specifically state it. That provision of the Practice Act has worked a radical change in our procedure and has enlarged the scope of matters which should be specially set out as ground of demurrer.

It is said in the brief of appellee that upon the argument of the demurrer in the Circuit Court no allusion was made to this objection and that it is presented in this court for the first time. Counsel for appellant do not controvert this statement and we assume that they can not.

While we must be guided by the record and not by assertions of fact in the briefs, we are impressed with the injustice of considering a point possibly not urged in the Circuit Court which does not go to the merits of the cause of action but only to the amount claimed, and which, had it been important as affecting the sum for which defendant was liable, could have been so readily obviated. The damages were assessed by a jury, counsel for defendant being present making some objections to the admission of evidence and cross-examining the plaintiff, who appeared as a witness. Nowhere in the proceedings do we find any suggestion in this respect. We think it can not be considered now.

As was said in *I. & St. L. R. R. Co. v. Estes*, 96 Ill. 474, "a case ought not to be reversed in this court on a question which the Circuit Court did not in fact decide, and which, if presented to that court, might at once have been obviated."

See also as analogous, *Tomlinson v. Earnshaw*, 112 Ill. 311, and *Utter v. Jaffray*, 112 Ill. 470.

The main controversy in the case and upon which the rights of the parties really depend is, whether the facts alleged as to the manner whereby the assured lost his life, fix

liability upon the defendant. It is averred in substance that by accident the assured took an overdose, or excessive quantity of laudanum which caused his death. The certificate limits liability to "injuries received by or through external, violent and accidental means," and it is contended on behalf of the company that such a case is not made by the allegation of accidentally taking poison.

In the case of Healey against this company, 133 Ill. 556, the Supreme Court held that death so caused was within the spirit of the policy and that the company was liable, precisely the same provision being under consideration.

Counsel urge, however, that the court overlooked another clause in the policy exempting the company from liability in case of "the taking of poison in any manner." It is true this clause is not discussed in the opinion, but we are not to assume that it was overlooked or that the proper construction of it should modify the views expressed.

We feel bound to follow the ruling of the Supreme Court. The judgment will be affirmed.

Judgment affirmed.

BLENDEN L. ROWLAND ET AL.

V.

HOMER M. SWOPE, ADMINISTRATOR.

Administration—Debts—Petition to Sell Land for Payment of—Sec. 98, Chap. 3, R. S.

1. Before a County Court can order the sale of a decedent's land for the purpose of paying debts, it must ascertain that the personal estate left by the decedent, and which has or should come to the hands of the executor or administrator, is insufficient to pay them.

2. Heirs are not to be held as sureties for the faithful performance by an administrator of his duties, nor are their rights dependent upon his integrity or negligence.

4. The real estate of a deceased person should not be ordered sold by the County Court for the payment of debts, where it appears there has been

Rowland v. Swope.

a sufficiency of personal assets to pay the same, but that they have been wasted by the administrator or executor, and never applied to such payment.

[Opinion filed January 24, 1891.]

IN ERROR to the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. W. L. & R. E. VANDEVENTER, for plaintiffs in error.

Messrs. McMURRAY & SWOPE, for defendant in error.

CONGER, P. J. This was a petition filed in the County Court of Adams County by Homer M. Swope, administrator *de bonis non* of the estate of Samuel Brierton, deceased, for the purpose of obtaining a decree for the sale of lands to pay debts. Samuel Brierton departed this life testate, September 9, 1885, and by his will appointed his son, Henry E. Brierton, his executor, without bond.

The executor, Henry E. Brierton, collected money due said testator to the amount of some \$700 for which he became legally accountable as such executor, and which personal assets were more than sufficient to pay all the claims against the said estate.

Such executor, however, squandered these assets, and after failing to make reports satisfactory to the County Court, on April 1, 1889, absconded from the State, leaving no property. On April 24, 1889, said executor was removed by the County Court and appellee was duly appointed administrator *de bonis non* with the will annexed.

Henry E. Brierton by his father's will was the devisee of some of the land of his father, which he had sold and conveyed to Rowland and Wainman, and they having been made parties to the proceeding, objected to its being sold.

The principal question, therefore, presented by the record is, can the real estate of a deceased person be sold by order of the County Court, for the payment of debts, where it appears

there has been a sufficiency of personal assets to pay such debts, although they may have been wasted by the administrator or executor, and never in fact applied to the payment of debts?

This precise question, so far as we are advised, has not been passed upon by the Supreme Court of this State. The case of *Young v. Wittenmyre*, 123 Ill. 303, lays down the general rule that where there is personal estate sufficient to pay all debts, the land can not be sold; still, as the administratrix who petitioned for the sale was herself in fault in paying out the personalty to heirs instead of paying it upon the debts, it perhaps may not be regarded as an authority upon the question in this case.

The authority for selling land to pay debts is to be found in Sec. 98 of Chap. 3, R. S., and is as follows:

“When the executor or administrator has made a just and true account of the personal estate and debts to the County Court, and it is ascertained that the personal estate of a decedent is insufficient to pay the just claims against his estate, * * * the real estate may be sold,” etc.

We hold that this section means, that before the County Court can order the sale of a decedent's land for the purpose of paying debts, it must ascertain that the personal estate is insufficient to pay them; that is, the personal estate left by the decedent, and which has or should come to the hands of the executor or administrator.

It is not enough for the court to find that there has been a sufficiency of personal assets left by the decedent, but at the time of filing the petition such assets have been wasted either by the petitioning administrator or executor, or by their predecessors in office. The heirs are not to be held as sureties for the faithful performance by the administrator of his duties, nor should their right be dependent upon his integrity or negligence.

The personal estate is the primary fund for the payment of debts, and only after applying it to their discharge, and there remains a deficiency, does the land become liable.

There is a conflict in the decisions of other States upon this

Phenix Ins. Co. v. Hart.

question, the following supporting, in part at least, the view we have taken: *Pry's Appeal*, 8 Watts, 253; *Kelly's Estate*, 11 Phil. 100; *Wise v. Smith*, 4 Gill & Johnson, 295; *Bennett v. Caldwell*, 3 Bax. (Tenn.), 487; *Paine, Adm'r, v. Pendleton et al.*, 32 Miss. 320; while the following seem to hold the contrary doctrine: *Nettleton v. Dizon*, 2 Ind. 446; *Foltz v. West*, 103 Ind. 494; *Fiscess v. Moore* (Ind.), 23 N. E. Rep. 364.

We think, however, sound reason, as well as the language of our statute, is consistent with the views we have expressed.

The court, we think, erred in granting the decree of sale under the circumstances as shown by the record, and its decree will therefore be reversed and the cause remanded.

Reversed and remanded.

THE PHENIX INSURANCE COMPANY

V.

SOLOMON HART.

39 517
149 513

Fire Insurance—Policy of—Action on—Conditions—Incumbrance—Sec. 23, Chap. 73, R. S.

1. An insurance agent is a proper source of information as to the practice of his company, and it is bound by the statements of such agent, whatever department of its business he has in charge.

2. The placing of a mortgage upon a tract of land other than that upon which a house stands, will not vitiate a policy of insurance on such house, a provision therein prohibiting incumbrances without permission, although the policy refers to it as standing upon the aggregate number of acres.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Mr. JOHN A. BELLATTI, for appellant.

Messrs. MORRISON & WHITLOCK, for appellee.

CONGER, P. J. On the 30th day of September, 1886, a policy of insurance was issued by appellant to appellee on the latter's house, situated upon one hundred acres in section 28, town 13, range 9, Morgan County, for a period of five years. The house was destroyed by fire September 28, 1889.

One of the conditions of the policy was, "or if the property shall hereafter become mortgaged or incumbered . * * * without consent indorsed thereon, then in each and every one of the above cases this policy shall be null and void. No agent or employe of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, except only the general agent at Chicago, Illinois, and any waiver or alteration by him must be in writing." On November 2, 1887, Mr. Burch, general agent, indorsed on the policy permit for a mortgage on the premises of \$2,000 to Elias Metcalf. This mortgage was given and no complaint is made about it.

Some three or four weeks prior to the making of this mortgage to Metcalf, appellee had executed a mortgage on sixty acres of the one hundred described in the policy, but not including the forty acres upon which the house stood, to one Layman.

It is the making of this Layman mortgage that is the principal cause of complaint.

There was a trial and verdict in favor of appellee for \$2,826, whereupon appellee remitted \$826, and judgment was entered for \$2,000.

Appellee testifies that he employed Mr. Upham, the local agent of the appellant company at Jacksonville, to procure for him the loan from Metcalf; that he brought his insurance policies to Mr. Upham and told him to send them in to the company and obtain permission to borrow the money; he also told the agent at this time that he was giving a mortgage upon the forty acres upon which the house stood to Metcalf, and that he had already placed the mortgage upon the other sixty acres of the one hundred mentioned in the policy to Layman, and asked Upham if it would be necessary for any permit from the company for this Layman mortgage, and Mr. Upham

answered that it would not; that a permit was only necessary when it was proposed placing a mortgage upon the forty acres upon which the house stood; and appellee says, relying upon this statement of Mr. Upham, he made no further effort to secure a permit for the Lyman mortgage.

These statements are denied by Upham, but the jury having found a verdict in accordance with appellee's statement, we see no reason for interfering with their conclusion as to the facts.

Mr. Upham says that he is the local agent of appellant at Jacksonville and has been since 1873; that he is agent for what is called the mercantile department, but had nothing to do with the farm department of the company. He sent the policies in to the company to get the premiums to make the Metcalf mortgage.

Appellant is a foreign insurance company and we are inclined to think is bound by the knowledge and acts of Upham as its agent.

In construing Sec. 23 of Chap. 72 R. S., entitled, "Insurance," the Supreme Court in the case of *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, use the following language:

"The manifest intention was to make such companies responsible for the acts not only of its acknowledged agents, etc., but also of all other persons who in any manner aid in the transaction of their insurance business. Nor do we see anything inequitable or oppressive in such provision. Doubtless the mere assumption of authority to act for an insurance company will not of itself charge the company with responsibility for the acts of the assumed agent. The company must in some way avail itself of such acts, so that the person performing them may be said to aid the company in its insurance business."

Upham certainly aided in the transaction of appellant's business, and was its local representative, and the fact that the company had a mercantile and farming department is of no consequence in this case. Appellee was authorized to apply to Upham for information and the company would be bound by the statement made by him to appellee.

We are inclined to think also that the placing of the Layman mortgage upon the sixty acres of land was not such a violation of the terms of the policy as would render it void.

The application and the policy, it is true, described the house as situate upon one hundred acres of land, which, as we understand the evidence, included a distinct forty acres upon which the house was located, and upon which the Metcalf mortgage was placed, and an adjoining and independent tract of sixty acres upon which the Layman mortgage was placed.

The Layman mortgage was not an incumbrance upon the house, and did not in any way affect the risk; appellee's interest in protecting and preserving the house was in no way lessened by the mortgage. No authorities have been cited upon this question, and its decision is one of first impressions with us, but it appears to be in accordance with reason and common sense.

An insurance company has an interest in preventing the building, and with it the lot or tract of ground upon which it is situate, from being incumbered, or the insured's interest being decreased, but it can be of no possible interest to such company what is done with an adjoining tract of land belonging to the insured which may happen to be included in the general description of the premises in the policy, unless it is so situated or connected with the lot upon which the insured premises stand, as to affect the value or usefulness of the latter.

That is clearly not the case here. Believing that justice has been done, the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

Windels v. Milwaukee Harvester Co.

FRED H. WINDELS
V.
MILWAUKEE HARVESTER COMPANY.

Guaranty--Notes—Payment of—Consideration—Agency.

In an action brought to recover upon the guaranty of certain promissory notes, this court holds that in view of a contract between the parties hereto, calling for the indorsement by defendant of certain classes of notes received in a given business, the liability was a continuing one, and required such indorsement, when the contingency provided for arose, and that the contention upon the part of the defendant that the guaranty in question was a subsequent transaction, and was obtained without any new consideration, can not avail him.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Montgomery County;
the Hon. JACOB FOUKE, Judge, presiding.

Mr. G. L. ZINK, for appellant.

Messrs. McWILLIAMS & SON, for appellee.

WALL, J. This was assumpsit upon a guaranty of certain promissory notes. The case was tried by the court, a jury being waived, and judgment was rendered in favor of the plaintiff for \$354, from which the defendant has prosecuted an appeal to this court.

The only question of importance is as to a consideration for the guaranty, which was placed on the notes several months after they were executed to the makers thereof. Appellant insists that the guaranty was a subsequent transaction and was obtained without any new consideration. Hence, it is argued the guaranty does not bind him.

It appears that appellant was the agent of appellee, the scope of the agency being the sale of machinery manufactured by appellee to persons living within certain territory within which appellant resided. This agency was evidenced by a written agreement, which, among other things, authorized the

sale of machinery on credit to responsible parties under certain conditions, which need not be specifically stated in full, and which provided that when any note taken by appellant for property so sold, was not accompanied by a "property statement," or by a chattel mortgage, or should upon examination prove doubtful, it should be indorsed by him.

The notes in question were taken in this way, and some months after their dates, appellant had a settlement with the general agent of appellee, in which they were turned over to the appellee as so much money, and appellant was credited with his commissions for making these and other sales. At the time of this settlement these notes, which were not secured by chattel mortgage, but which were accompanied by "property statements," were presented to appellant for his indorsement, and he thereupon indorsed them, writing his name below the printed form of guaranty on each one. The liability to do this was expressly provided for in the contract of agency, where it was stipulated that where any note should upon examination prove doubtful, he would indorse it.

The liability was a continuing one and required his action whenever the contingency arose. The mere fact of the presentation of the notes to him for that purpose and his immediate act of indorsing would clearly indicate that both parties considered the case within the contingency. Appellant acquiesced in the proposition tacitly advanced by appellee that the notes were such as he was bound under the contract to indorse. There is nothing in the record to show the contrary, and for all that appears these notes were not only doubtful but utterly worthless.

Having by his conduct admitted that he was required to indorse the notes under the contract, and the appellee having under such circumstances taken the guaranty from him, and presumably having relied upon his personal responsibility therefor, it may well be doubted whether he could be permitted long afterward to show that the notes were not then doubtful.

Upon the case as it appears in the record the judgment is certainly right and it will be affirmed.

Judgment affirmed.

Timmerman v. Pusey.

ELIZABETH TIMMERMAN

V.

NATHAN T. PUSEY.

Attorney and Client—Services Rendered—Recovery for—Evidence—Instructions.

This court declines, in view of the evidence, to interfere with the judgment for the plaintiff in an action brought by an attorney to recover fees for services rendered.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

Mr. FRANK R. HENDERSON, for appellant.

Mr. B. C. LUCAS, for appellee.

WALL, J. This was an action of assumpsit by appellee against appellant to recover for legal services, resulting in a verdict and judgment thereon in favor of the plaintiff for \$150. The main question in the case was, whether the services were pursuant to the request of the defendant. On this point the proof though not free from conflict sufficiently supports the verdict. As to the value of the service there is no serious question.

The court gave three instructions at the instance of the plaintiff, in which the legal rules applicable from the standpoint of the plaintiff's testimony were correctly stated. Three instructions were given at the instance of the defendant, two of them being somewhat modified. We think the modifications were not erroneous. Two instructions were refused.

As to one of them, so much of it as was essential was contained in the third given, and as to the other, there was not

enough evidence upon which to predicate it, or at most to require it to be given. We can not see that the case of the defendant was prejudiced by the action of the court in reference to the instructions, and we are inclined to think that the judgment is according to the merits.

It will therefore be affirmed.

Judgment affirmed.

DWELLING HOUSE INSURANCE COMPANY

V.

M. L. DOWNEY.

Negotiable Instruments—Note—Execution of—Fraud and Circumvention in Obtaining—Application for Insurance.

In view of the evidence, this court affirms the judgment for the defendant in an action brought by an insurance company to recover upon a note alleged to have been given by him in payment of the premium on one of its policies, the defendant contending that its execution was procured through circumvention and fraud, he supposing he was signing an application for insurance, instead of a note.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Moultrie County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. I. D. WALKER, for appellant.

Messrs. EDEN & COCHRAN, for appellee.

CONGER, P. J. This was an action upon a note for \$82, claimed to have been given by appellee to the appellant in payment for a policy of insurance on the dwelling house of appellee. Verdict and judgment below for appellee.

The defense was fraud and circumvention in obtaining the execution of the note. Upon this question there was a sharp

conduct in the evidence. According to appellee's evidence, Watkins and Nichols, who were representing appellant, came to his home and spent the night with him. Watkins introduced Nichols as the agent of appellant, and that evening wrote up an application, at the bottom of which was the blank which, when afterward filled up, formed the note in controversy. Appellee claims that the amount of insurance was to be \$2,650, and he was to give his note in payment therefor for \$62 and some cents; that appellant's agent also induced him to believe that a policy he, appellee, then held on his home in another company was worthless, and that such policy was given up; that he signed what he supposed was the application, but which was in fact the blank note at the bottom of the application, and which was afterward filled up as the note in suit, without the knowledge or consent of appellee. The policy was afterward sent to appellee, and was for \$1,650, instead of \$2,650, whereupon appellee returned it.

This statement, in many of its parts, was denied by Nichols and Watkins, but the jury have given credence to appellee's version, and after a careful examination of the record we can not say they are unwarranted in so doing. Taking appellee's statement as true, we think the defense was made out.

Whatever might be the rights of a *bona fide* assignee before maturity, as between the original parties the execution of the note was procured by fraud. Appellee had no intention of signing any note whatever, but supposed he was merely signing the application.

From the circumstances it is clear that appellant's agent knew this, and when he afterward made a note above appellee's signature it was, we think, such a fraud as would vitiate the note in the hands of appellant.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

S. H. WILBUR
V.
W. C. TURNER.

Practice—Tort of Constable—Aiding Unlawful Act by.

1. Whether or not certain facts in evidence in a given case constituted "aid" in a legal sense, to a person in the doing of an alleged tort, is for the jury to decide.

2. In an action brought to recover from the defendant for aiding a constable in wrongfully removing personal property of the plaintiff, the same never having been returned, this court declines, in view of the evidence, to interfere with the judgment in his behalf.

[Opinion filed January 24, 1891.]

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. CONKLING & GROUT and J. C. SNIGG, for appellant.

Messrs. PATTON & HAMILTON, for appellee.

Per Curiam. Appellee was the owner of two horses which one Charles H. Tipton, a constable, took away from his premises, and appellee never saw them again. No legal justification was offered for such taking. Appellant was sued for having aided Tipton in this wrong done to appellee, and upon the trial a jury returned a verdict against appellant for \$325, upon which judgment was rendered. The whole controversy was as to whether appellant by his acts in the premises had made himself liable to appellee for the unlawful taking. We have carefully read the evidence and think it clearly warranted the verdict.

Appellant criticizes appellee's instructions because the words, "aided, abetted and assisted," as used in the instructions, were not qualified by the court, and referring to cer-

Razor v. Razor.

tain facts proved, asks: "Do such acts constitute "aid" in a legal sense, to Tipton, in the doing of the alleged tort?"

Whether they did or not was a question of fact for the jury.

We think the objection untenable and the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

FREDERICK RAZOR
V.
GERTRUDE B. RAZOR.

39 527
149s 621

Husband and Wife--Written Contract--Parol Agreement--Evidence--Instructions.

1. Supposed errors in instructions should be pointed out specifically, and not referred to in general terms.

2. A person may prove the existence of a separate oral agreement as to matters upon which a written contract is silent, and which is not inconsistent therewith, if it can be inferred that the parties did not intend the writing to be a complete and final statement of a given transaction, and this rule applies to parol agreements as to how a written contract is to be performed.

3. In an action brought by a married woman upon a written contract executed by her husband, and certain parol provisions not contained therein, the substance being an agreement upon the part of the husband, in consideration of the wife signing a deed of conveyance of their home, to invest in her name the proceeds of the sale thereof in another house in a different place, this court holds that the plaintiff's existing interest in the property being sold by her, formed the consideration for the undertaking upon the part of the defendant to furnish the other house; that it was a good and sufficient consideration to support the agreement; and declines to interfere with the judgment for the plaintiff.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

Messrs. JOHN E. POLLOCK, JOHN STAPLETON and A. J. BARR,
for appellant.

Mr. FRANK R. HENDERSON, for appellee.

CONGER, P. J. This was an action of assumpsit and attachment brought by appellee against appellant, her husband, based upon a written contract and certain other parol provisions not contained in the writing.

The writing was as follows:

“LE ROY, ILLINOIS, January 18, 1890.

“I, Fred. Razor, of Le Roy, Ill., do agree to and with my wife, Gertrude Razor, that in consideration of her signing a deed of conveyance to our home place (being lot 2 of lot 7 of the subdivision of the southwest quarter of the southeast quarter of Sec. 21, T. 22 N., R. 4 E., in Le Roy, McLean Co., Ill.), this day executed, I do hereby agree to invest the proceeds of said sale in a house in Bloomington, Ill., and have the same deeded to said Gertrude B. Razor, to be owned by her.

his
FRED. X RAZOR.”
mark

“Witness: A. RUTLEDGE.

The general issue was pleaded, and there was an agreement that anything might be proved thereunder that might be shown under any proper, special plea.

The trial resulted in a verdict and judgment for \$2,000 in favor of appellee.

The first point made by appellant is that “the court permitted appellee to prove an additional agreement to the one sued on, that was claimed to have been in parol.” This objection is based upon the following evidence given on the trial by appellee:

Q. What was the agreement as between you and your husband as to who should select the property, that this agreement provides should be purchased for you, if any agreement of that kind was made?

Objected to.

Razor v. Razor.

The Court: "The agreement is silent upon the question, in view of the fact I will permit the witness to testify."

To which ruling of the court defendant then and there excepted.

A. "He told me I should select the house."

Q. "As between you and him, what is the agreement as to whether or not the proceeds should be cash?"

Objected to; objection overruled; and defendant then and there excepted.

A. "It was to be cash. After the deed and agreement were signed I came to Bloomington after we packed up the goods; came the 21st of January."

We think there was no error in the ruling of the court upon this point.

The written agreement has no provision bearing upon or referring to these questions. They are both matters about which a parol agreement might be entered into by the parties, which would in no way be inconsistent with the terms and provisions of the writing.

In 2 Wharton on Ev., Sec. 1026, it is said: "A party is at liberty to prove the existence of any separate, oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them." This rule also applies to parol agreements as to how a written contract is to be performed.

It is next urged that the agreement sued upon was obtained by fraud and circumvention.

The jury found against appellant upon this issue, and we see nothing in the evidence which would justify a reversal upon that ground.

It is contended the court erred in refusing to permit appellant to offer evidence tending to show that appellee had been guilty of adultery since her marriage to appellant.

Appellant insists upon his right to do this, because prior to his marriage with appellee he had executed to her a deed for

the Le Roy property mentioned in the written agreement, and which deed contained the following clause: "It is agreed by and between the grantor and grantee that the said Gertrude Gibbs shall marry and shall live as the lawful wife of said Frederick Razor, and when she ceases to live as his wife the property herein described shall revert to the grantor, or to the heirs of his body."

It is not necessary to determine the proper construction of this condition.

Appellee's existing interest in the property, whatever it was, was sold by her, and formed the consideration for the undertaking upon the part of appellant to furnish another house in Bloomington, and it was a good and sufficient consideration to support the agreement.

Counsel for appellant in their brief, say:

"The court refused a large number of instructions offered by defendant (appellant) and gave instructions for the plaintiff (appellee), to both of which we desire especially to call the attention of the court. A large number, or at least some, of the defendant's refused instructions should have been given, and probably several of the plaintiff's instructions should not have been given."

These supposed errors in the instructions have not been pointed out with any more particularity than in the above extract from appellant's brief, and we have neither the time nor inclination to search for them.

A majority of this court think substantial justice has been done, and the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY

V.

ISRAEL H. LIGHT.

Railroads—Negligence of—Injury to Animal in Car.

Whether or not the death of an animal, while being transported by a

I. C. R. R. Co. v. Light.

carrier, arose through the negligence thereof, is a question of fact for the jury.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

Messrs. WILLIAMS & CAPEN, for appellant.

Mr. THOMAS F. TIPTON, for appellee.

WALL, J. The main question in this case was one of fact, whether the animal was thrown down in the car and injured by the negligent manner of moving the car. As to this the evidence was conflicting.

It is quite certain that the animal was killed by reason of some unusual and violent means, and it was a fair question for the jury whether the result was due to negligence as alleged.

While some of the witnesses testify the car was handled carefully, and that there was no sudden starting or jerking, others testify just the contrary and clearly support the plaintiff's theory.

We are unable to say that the Circuit Court erred in refusing a new trial on this ground.

The second instruction given at the instance of the plaintiff is not objectionable in the particular suggested, that it does not limit the plaintiff to the case alleged in the declaration. Nor was there error in refusing the last instruction asked by defendant, as the substance of it and the point it presents may be found well stated in others that were given.

On the whole case there is no apparent error sufficient to call for the interference of this court. The judgment will be affirmed.

Judgment affirmed.

TRUESDALE MANUFACTURING COMPANY

V.

W. F. HOYLE.

*Contracts—Balance Due—Payment—Set-off—Evidence—Instructions —
Practice—Damages for Delay.*

1. Where no time is fixed, the law will imply that material for a given purpose is to be furnished within a reasonable time, which will vary with circumstances.

2. Where a person so agreeing to furnish, knows that the purchaser is required to complete a given contract within a certain time, he contracts with this fact in view, and takes the risk of delay arising from the pressure of other engagements and from possible failure to obtain certain articles necessary to enable him to so furnish.

3. It is proper in an action brought to recover an amount alleged to be due from a contractor, where the latter contends that he has been injured through delay in furnishing the goods in question, to allow such contractor to show that certain subcontractors have collected from him by suit damages for delays caused them in the performance of their contracts; such judgments are not conclusive as against those who were not parties to it, but they tend to show the damage as claimed by such contractor.

4. A witness should not be interrogated upon cross-examination as to a matter upon which a party in interest bases no claim, or one which calls for an argumentative reply.

5. It is proper upon calling a party to a suit as a witness to require him to state and produce letters and telegrams in his possession received from the party calling him, the same relating to the subject in controversy, without serving notice, or a subpoena *duces tecum* specifying what papers are wanted.

6. Evidence as to directions given by a contractor as to pushing a certain work may be admitted in a given case, where the same had reference to the methods adopted as to the work in hand.

7. The leading facts of a case should be presented hypothetically before asking an expert witness how much loss of time would be caused by mechanics changing from one kind of work to another.

8. Where the pleas in a given case do not deny the plaintiff's cause of action, but allege payment and set-off as a defense, the burden of proof is thrown upon the defendant and gives him the right to begin and conclude.

[Opinion filed June 12, 1891.]

Truesdale Mfg. Co. v. Hoyle.

APPEAL from the Circuit Court of Logan County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. WORTHINGTON, PAGE & BRADY and BEACH & HONNETT, for appellant.

Messrs. BLINN & HOBLIT, for appellee.

WALL, J. Appellant sued appellee to recover a balance of \$1,114.06, alleged to be due on account for certain, "mill work" furnished under contract. Against this balance appellee filed pleas of payment and set-off on account of certain items of sundries, freight bills and drayage, aggregating about \$255, and for damages caused by delay in furnishing said mill work. The case was tried by jury resulting in a verdict in favor of appellee for \$466.99, from which \$200 was remitted. Judgment was rendered for \$266.99 against appellant, to reverse which this appeal is prosecuted. It appears that about April 1, 1889, appellee took the contract to erect a public school building at Carrollton by September 15th, following, for the sum of \$35,000, and that he then met Mr. Truesdale, president of appellant corporation (located at Peoria), who was seeking to furnish the mill work, being the wood work, flooring excepted, required for the building. They had some conversation then, and a few days later they met again at Lincoln but no contract was entered into. Afterward the following correspondence passed between the parties:

"LINCOLN, ILL., April 16, 1889.

TRUESDALE & Co.,

Dear Sirs: I promised to come over to see you about the mill work for the Carrollton school house, but I can't spare time. Will you please send me your lowest figures without the glass? Also with the glass all set, and the stairs put up complete, as I have bids that way, o. b. c. at Carrollton, Ill., with the frames put together? Please let me hear soon as I want to let it.

Respectfully yours,

WM. F. HOYLE."

"PEORIA, ILL., April 19, 1889.

W. F. HOYLE, Esq., Lincoln, Ill.,

Dear Sir: We will furnish f. o. b. cars at Carrollton, Ill., the following mill work for school house, for the sum of \$2,940. All outside and inside door frames. All outside and inside window frames. All doors for same. All windows for same glazed and transoms glazed. All subjams, stools and castings for windows. All casings and carpet strips for doors. All wainscot cap and blackboard band. All picture moulds and quarter rounds. All casings for four posts. All grilles, beams and brackets. All steps and partition caps in basement. All stairs and steps with posts and railings. All wood cornice for round tower. We will put up the stairs and rails and prime and oil all outside frames. All work to be according to F. S. Allen's plans and specifications. Payments to be made monthly as work is delivered.

Very truly yours,

TRUESDALE MANUFACTURING CO.,

F. B. TRUESDALE."

"LINCOLN, ILL., May 3, 1889.

"TRUESDALE & Co.

"Dear Sir:—You can go ahead and get out the mill work for the Carrollton school house. The brick mason will want the basement frames in about ten days. Make and ship them as soon as possible and oblige

"Yours truly,

"WM. F. HOYLE."

"PEORIA, ILL., May 4, 1889.

"W. F. HOYLE, Esq., Lincoln, Ill.

"Dear Sir:—Your favor of the third at hand and noted. We have entered your order and will have the frames ready in time. We have written to Mr. Allen to-day to send us a copy of the plans and we will be unable to do anything without them.

"Very truly yours,

"TRUESDALE MANUFACTURING CO.

"F. B. Truesdale."

The building was not completed so far as to be occupied

Truesdale Mfg. Co. v. Hoyle.

until about the 25th of January, 1890. This delay was caused, as alleged by appellee, by the failure of appellant to furnish the mill work as required, and it was claimed by appellee that he was greatly damaged by such failure of appellant and the consequent delay. Upon the question of this damage and the responsibility of appellant therefor there was a large amount of testimony.

After carefully reading the abstract and referring frequently to the record, we are inclined to think the evidence so fully justified the verdict as it stood after the *remittitur*, that we can not properly interfere with the judgment upon the questions of fact involved. The printed arguments of counsel go very thoroughly into this branch of the case and have received attentive consideration. It would be impossible within reasonable limits, to advert in detail to the testimony, and we shall be content with this reference to it, and our conclusion upon it.

We shall therefore consider next the legal questions raised by counsel upon the action of the court in admitting and excluding testimony and in giving and refusing instructions.

The four letters above set out constituted the contract between these parties. It was so averred in the first count of the declaration, copies of the letters being attached and designated as "copy of the instrument sued on." It was not denied that the work was furnished and that the balance sued for was unpaid, except as to certain credits for freight charges and sundries furnished by appellee, about which there was no substantial controversy.

The main dispute was as to the damages for delay. It will be noticed that no time was fixed within which the work was to be furnished except as to the basement frames which were wanted in about ten days from May 3d, and the law would imply a reasonable time. What that was might vary with circumstances. Appellant knew, as the evidence tends to prove, that appellee was required to complete the building by a certain time and must have known that the profitable performance of the contract depended greatly upon a regular and systematic supply of all materials to be furnished by sub-

contractors, so that no part of the work should wait upon another. Appellant must be held to have contracted with this fact in view, and it took the risk of delay arising from the pressure of other engagements, which was one excuse offered, and from possible failure to obtain articles, such for instance as glass, necessary to complete its work, the want of which was set up as another excuse for the delay complained of.

Another excuse urged was that the architect, Allen, did not furnish the plans promptly, and it is insisted that such neglect of Allen should exonerate appellant for any delay thereby occasioned. The contract did not so provide; indeed it distinctly implied the contrary. The proper construction of it placed this risk upon appellant, and this is in accordance with the verbal discussion of the matter between the parties before any of the letters referred to were written.

As to all these points we think the court ruled properly in regard to the evidence, and that as to the instructions, there is no error of which appellant may complain. It is objected that the court erred in permitting appellee to testify to the fact that he had been sued by the stone and brick sub-contractors and been compelled to pay \$1,100 as damages for the delay caused them, of which, as appellee estimated, \$600 was for the failure to furnish the window frames in time. We see no objection to his making the statement. The judgment was, of course, not conclusive as against those who were not parties to it, but it tended to show that the appellee had been damaged, as he claimed. The plaintiffs in that judgment were subsequently put on the stand as witnesses in this case, and testified in detail as to the particulars of their demand against appellee. Of course, the record itself was the best evidence of what the judgment was for, and the court said that either party might produce the record if desired, but that was not the objection.

It was not objected that the judgment could not be so established, but that it was not competent to show that appellee had been subjected to a judgment, because appellant could not be bound thereby. Of course, if appellant had been a

party, the judgment would have been conclusive and no other proof of appellee's damage, so far as the stone and brick was concerned, would have been necessary. The evidence offered by the appellee sufficiently showed that the judgment was not larger than was proper and that there was no collusion. There was no proof by appellant contradicting this evidence.

The judgment was competent as tending to establish the position of appellee. It was not insisted that it was conclusive; on the contrary the jury were instructed that the appellee must show that appellant had failed to furnish the mill work within a reasonable time before he could sustain his claim for a set-off. The court did not err in admitting the evidence nor in refusing to instruct the jury that it was not to be considered by them.

Had appellant thought it necessary to instruct the jury that it was not bound by the judgment it should have asked an instruction to that effect, which the court would doubtless have given.

The statement by appellee that of the judgment, \$600 was for the delay in the window frames, was technically, perhaps, not proper, for it was merely his opinion as to how much of the judgment was based on that item; but we can not see that any serious harm was thereby done to appellant.

The way was open by cross-examination to demonstrate that the estimate was erroneous, and inasmuch as the whole subject of damages as to each item where there was delay was fully and thoroughly investigated, it can not be supposed the jury took this mere estimate as conclusive and omitted to consider the facts in proof upon which it was predicated. For such an error the judgment should not be reversed.

It is complained that the court refused to permit the following question to be asked of appellee on cross-examination:

"If you had carpenters there you did not need or could not do the work, it was your fault and not the fault of Truesdale & Co.?" Strictly speaking, this called for an opinion, an argumentative reply, and might have been excluded for that reason. The proper question was whether he had unnecessary

employees. What legal result followed, if so, was not for the witness to determine.

Another question which the court refused permission to ask on cross-examination was whether appellee had been required to pay any damages or suffer any decrease of price on his contract with the school authorities. It was not claimed that he had been damaged in that way, and it was unnecessary to ask this question. Objection is taken to the refusal to permit a certain question to be asked the witness Flemley, on cross-examination, in regard to the claims made by masons for damages by delay on account of stone work as distinguished from the brick work. We do not see just how this refusal worked any serious harm to the appellant. As to all these objections it may be said that it is not apparent the court improperly exercised its discretion in shortening the examination of the witnesses. While great latitude is allowable upon cross-examination there must be an end, and unless it appears that some serious invasion of the appellant's rights has occurred, the objections thus urged should be overruled. The same observation may be made as to the objection that Mr. Truesdale, president of appellant company, was placed upon the stand and required to state and produce any letters and telegrams in his possession received from appellee relating to the transactions in controversy. It is said this was irregular; that notice or a subpoena *duces tecum* should have been served specifying what papers were wanted. The only objection made at the time was that no particular papers were designated.

It would have been a useless waste of time to stay the trial until counsel could make out a list of the required letters and telegrams, and the practical way was to let the witness produce what he had, from which the appellee might read what was desired, leaving appellant to read the residue, if necessary or desirable. Mr. Truesdale was compellable to testify, and he might have been required at much expense of time and patience to state whether he received a letter or telegram of such and such a date, or about that date, relating to a particular matter. The mode adopted was the better one, and if

possibly irregular under the old practice, when parties were not competent and could not be compelled to testify against their own interests, it should not be regarded as reversible error at the present time.

The appellant objects that the witness Flemley, was asked and permitted to answer what directions he had heard appellee give about pushing forward the work.

This was competent as part of the *res gestæ*, to show the methods adopted in reference to the business in hand. The objection was properly overruled by the Circuit Court, as it must be here.

It is objected that the court refused to permit appellant to prove by two persons who were expert builders, how much loss of time would be caused by carpenters changing from one kind of work to another. Obviously there could be no general rule about this. It would depend upon the circumstances of the particular case, and the hypothesis presented to these witnesses was so narrow and limited as to give no foundation for an opinion that would have been useful in this investigation. Assuming without deciding that the matter was one as to which the opinion of an expert was admissible, the leading facts of the case should have been presented hypothetically, from the standpoint of the appellant, at least, as a basis for an opinion.

Such testimony is of but little use, at best, upon a point involving so many conditions and limitations, and could have done no good in this instance, in response to questions in the form proposed. As was said by one of the witnesses in answer to a subsequent question, he could not tell what expense of delay would be caused by building up an inside wall first; it would depend upon the workmen.

The answer to the proposed questions would necessarily be so vague and depend so much upon conditions not stated, even if capable of statement or practicable consideration in their thus detailed or combined effect upon the particular matter, as to be of no value.

One who was present and noted all that occurred and what was the result, might state it as a fact. One who was not

present could hardly give an opinion without knowing all the conditions.

Another objection is that the witness Truesdale was not permitted to answer what frames were referred to in a freight receipt of May 25th. It does not appear that there was any dispute as to what frames they were, or that an answer would have thrown any useful light upon the controversy. Other objections especially urged in reference to the exclusion of testimony, pertain to questions which sought to bring out evidence showing that the appellant had used due care and diligence in endeavoring to comply with its contract. It was competent to show what was actually done, and to show the facts generally for the purpose of proving whether the contract to furnish the work within a reasonable time had been complied with. Here was an absolute understanding to do a certain thing, and it was no defense that the appellant using due care and diligence was unable to perform its contract. The contract should not have been undertaken by one who could not perform it. This point has, however, been sufficiently referred to heretofore, and need not be further discussed now.

The instructions given for appellant very fully presented every rule of law necessary to be stated, and if any error in this respect appears, it was in stating some of those rules too broadly and favorably for the appellant. We have found no error prejudicial to appellant, in those given for appellee.

The last objection urged is that the appellee was permitted to open and close to the jury.

The pleas did not deny the plaintiff's cause of action, but alleged payment and set-off as a defense. These threw the burden of proof upon defendant, and, of course, gave him the right to begin and conclude. This was done without objection on the part of appellant, so far as the record shows, and even if the case was not in a condition to justify such action, no error could be assigned unless exception had been noted at the time. We find no other points raised in the brief, and being of opinion that no material error is disclosed by the record, must affirm the judgment.

Judgment affirmed.

THE CHICAGO & ALTON RAILROAD COMPANY

V.

LEONARD MATTHEWS.

39	541
48	366
39	541
153	269

Master and Servant—Railroads—Negligence of—Personal Injuries—Viaducts—Car of Unusual Height—Evidence—Instructions.

1. In an action brought to recover for personal injuries alleged to have been suffered by a servant through the negligence of his employer, a rail road company, this court holds, that in view of the giving of erroneous instructions touching the question of care and negligence upon the part of both parties, the judgment for the plaintiff can not stand.

2. In the case presented, this court holds that the jury should have been instructed to determine, from all the facts and circumstances in evidence, whether, under a fair and reasonable construction of all the rules offered in evidence, the plaintiff was in the line of his duty when injured, and if he failed to observe one of these rules, whether it was under such circumstances as would justify him in such failure.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of McLean County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. WILLIAM BROWN and WILLIAMS & CAPEN, for appellant.

Messrs. BENJAMIN & MORRISSEY, for appellee.

CONGER, P. J. Appellee is a young man twenty-four years of age. He commenced work as a regular brakeman on the Chicago division of appellant's road (from Chicago to Bloomington) in September, 1889, and continued until April 16, 1890, when he was hurt. Prior to that time he was employed by that company as a brakeman on other divisions and as a switchman.

At Joliet station, on the line of the road, are the works of the Joliet Steel Company, a private corporation. These consist of blast furnaces, rolling mills, boiler houses, smoke stacks

and other appurtenances used in the manufacture of the various kinds of steel products, with large grounds, in which are piled coke and other materials, and through which and between the buildings run the main tracks of the Chicago & Alton and the Santa Fe railroads, as well as a number of side tracks used for switching purposes in the night as well as day.

Across its main tracks, east and west, the appellant permitted the Steel Company to erect two viaducts or bridges, on each of which is constructed a railroad track, used only by the Steel Company for the transportation of materials from one part of the grounds to another. At the north one of the two, appellee was injured. It was nineteen feet ten inches from the rail of appellant's track to this viaduct. The bridge would easily clear a man standing on the ordinary cars of appellant, but was insufficient to clear a man standing on the top of unusually high cars. The bridge is approached by a curve from the south, the track over it being parallel with appellant's until within a short distance of the bridge, when the grade rises and curves to the bridge. No reason is apparent why the appellant did not require the Steel Company to place the bridge a sufficient height above the tracks, to clear its employes on all cars run over its road, before granting permission for the erection of a bridge it was under no obligation to consent to. The only explanation offered is the testimony of the superintendent of the Steel Works, who says: "It is already too high for convenience."

At the time appellee was injured it was very dark along the track of appellant through the Steel Mill yards, on account of the smoke, steam and dust caused by the operation of the works there, and the switching being done; so much so that appellee, though looking for the bridge, could not see it, and was unable to tell where he was with reference to it.

There was no signal, or warning of any kind, placed to apprise appellee of the location of the bridge, or of its height. The evidence shows that a customary signal for that purpose in use on appellant's road, was the erection of two poles, one on each side of the road, at a distance of 100 to 150 feet from the bridge, with a wire stretched between the

poles, over the track. From the wire are hung cords or straps, so hung that the lower ends of the straps shall be on a level with, or a little lower than the bridge, so that when struck by the straps an employe receives warning in time to avoid the bridge, that he is in danger of being struck by. It is claimed for appellee that the use of this simple and inexpensive signal, or the setting of a lamp at the level of the bridge, would have enabled him to avoid collision with the bridge, which in the darkness he was unable to see.

On April 16, 1890, appellee was called by the regular call boy, in the regular course of his business, to go from Brighton Park to Bloomington on a wild freight train—that is, one not on the time table as a regular train, but managed wholly by telegraph orders, having no “rights,” but bound to keep out of the way of all regular trains and “look out for everything.”

The train was composed of all through loads, and was made up by other servants of the company, under the direction of the train-master. A private car, marked “Menasha Woodware Co.,” one about three feet higher than the standard cars of appellant, was put in the train, and was the third forward of the caboose in a train of thirty or forty cars. In that position the rear brakeman was compelled to pass back and forth over it to perform his duty. It could have been placed in the middle of the train where neither brakeman would be obliged to cross it in the ordinary course. This was the first car of that make that appellee had seen. Appellant was in the habit of receiving foreign cars of different heights and make in the course of business at Chicago, and transporting them over its road.

Appellee was the rear brakeman on the train that proceeded on its way south, reaching the entrance of the Joliet yards about 10:10 p. m. At the whistling post, north of the crossing of the E. J. & E. R. R. and north of the Steel Mill, which point he recognized by means of a light on a semaphore signal beside the track, appellee left the caboose, went on top of the cars and commenced to set brakes, in obedience to the following rules of appellant: “All trains, except passenger trains,

must approach all stations, under complete control, *expecting to find the preceding train on the main track*, whether it may be a stopping place, as per table, for that train or not. Conductors of freight trains must see that their brakemen are on top of the train before reaching the whistling post, approaching and passing all stations." In addition to the rules above quoted, their train was followed by No. 4, which is the regular night express passenger train from Chicago to St. Louis. The passenger train was due in Joliet in a few minutes, and the freight train was so near on its time that it became the duty of the men in charge of the freight to take the side track, out of the way of the passenger. The bridge in question was a little more than a good train length from the connection where the train could back onto the side track, and was used by the trainmen as a "land mark," to reach the connection at the proper rate of speed.

Appellee continued to set brakes until the train was slowed down. To do that he was compelled to pass over the high car and set two to four brakes in front of it. This done he noticed the engine had started forward and was using steam. It then became his duty to release the brakes he had so set, to prevent the train being pulled in two, and in releasing the brake he was compelled to pass over the high car, climbing the upper steps of the side ladder, walking over it, and so down on the other end. He released the brake on the high car at its south end, then walked to its rear end, turned in a stooping position to look for the bridge, before climbing down. He was unable to see the bridge on account of the smoke and darkness and just after turning to look for it, was struck by the bridge, on the forehead, and knocked off the car. When found he was south of the bridge, in the middle of the track over which his train had run. He was put on the caboose of the train which had backed through the connection out of the way of the passenger train, until it was very close to where he was found.

We think the judgment of the Circuit Court should be reversed because of error in the instructions.

The questions of fact disclosed by the evidence make the

question of reasonable care and negligence upon the part of both appellant and appellee a close one, and hence it was of the utmost importance that the jury should have been clearly instructed upon this question. Many of the instructions are too long, involved and complicated to give to the jury a clear understanding of the relative duties of the parties.

Some of them, too, give undue importance to certain facts by mentioning them and entirely ignoring all others in the case. Instruction No. 3 for appellee is especially obnoxious in this respect.

Appellee's sixth instruction is as follows:

"6. The court instructs you that while the plaintiff was required to use reasonable care and diligence to comply with the rule of the company, yet in determining the question of what is reasonable care and diligence, you should take into consideration all the circumstances surrounding the plaintiff as shown by the evidence, and if you believe from the evidence that by reason of negligence on the part of the defendant, the plaintiff was, without fault on his part, prevented from complying with one or more of the rules offered in evidence, then you should find for the plaintiff, notwithstanding such failure to observe such rule, if you further believe from the evidence that the plaintiff, while in the exercise of reasonable care for his personal safety, was injured by or through carelessness or negligence of the defendant as charged in the plaintiff's declaration." There was no evidence that any negligence upon the part of the appellant prevented appellee from complying with the rules, and hence this instruction tended to mislead and confuse the jury.

The claim of appellee was that in going on the high car at the time he was struck, he was doing his duty; that he was in fact complying with the general spirit and tenor of the rules of appellant; that the rule requiring him to keep off of high cars, when near to bridges, was to be given a reasonable construction, so as to harmonize with others requiring him at certain times to be on top of the train.

It was this claim which appellee urged upon the jury, and not that appellant had been guilty of any particular act of

negligence that prevented appellee from complying with the rules.

The jury should have been told to determine from all the facts and circumstances in evidence whether, under a fair and reasonable construction of all the rules offered in evidence, appellee was in the line of his duty, and if he failed to observe one of these rules, whether it was under such circumstances as would justify him in such failure.

This was one of the vital points in the case and we are inclined to think this instruction directed the jury to determine it upon an erroneous hypothesis, and one not justified by the evidence.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

JOHN KERR ET AL.

V.

PERRY HODGE.

Master and Servant—Negligence of Mine Owner—Failure to Comply with Secs. 14 and 16 of Act of June 16, 1887—Props—Witnesses—Credibility of—Evidence—Instructions.

1. The credit of a witness may be impeached by proof that he has made statements out of court, contrary to what he testifies at a given trial.

2. Such proof should be permitted to go to the jury, and they should be told to consider it in determining what credit and force shall be given a witness under such circumstances; but they should not be instructed that they can rightfully disregard the entire testimony of a witness for that reason unless corroborated.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Schuyler County; the Hon. J. C. BAGBY, Judge, presiding.

Kerr v. Hodge.

Messrs. W. L. VANDEVENTER, S. B. MONTGOMERY and P. E. MANN, for appellants.

A party is entitled to have the law accurately announced in all the instructions. C., B. & Q. Ry. v. Payne, 49 Ill. 499; Ill. Cent. Ry. Co. v. Maffit, 67 Ill. 431; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Railroad Company v. Harwood, 80 Ill. 88.

Especially is this the law where the evidence is conflicting. Town of Geneva v. Peterson, 21 Ill. App. 458, and cases there cited; Keys v. Fuller, 9 Ill. App. 530; Goodkind v. Rogan, 8 Ill. App. 416; Loman v. Best, 30 Ill. App. 323; King v. Barnes, 30 Ill. App. 339; Holloway v. Johnson, 129 Ill. 367; Shaw v. The People, 81 Ill. 150; Stone & Lime Co. v. City of Kankakee, 128 Ill. 173.

The first instruction given for the plaintiff was clearly erroneous. It assumes that the defendants wilfully failed to furnish props or cap-pieces. The conclusion of the instruction contains a pointed intimation from the court that there had been a "wilful failure" on the part of the defendants. Any assumption or intimation from the court as to a material, controverted fact is always prejudicial error. Star & Crescent Milling Co. v. Thomas, 27 Ill. App. 141; C. & N. W. Ry. Co. v. Moranda, 108 Ill. 576; Chambers v. The People, 105 Ill. 417; Tascott v. Grace, 12 Ill. App. 639; Ashlock v. Linder, 50 Ill. 169; Chichester v. Whiteleather, 51 Ill. 259; Town of Evans v. Dickey, 117 Ill. 291; Village of Warren v. Wright, 103 Ill. 299; Coon v. The People, 99 Ill. 368; C., B. & Q. Ry. Co. v. Dickson, 88 Ill. 437; 1 Thomp. on Tr., Sec. 1039; Sigsworth v. McIntyre, 18 Ill. 126; C. & E. I. Co. v. O'Connor, 119 Ill. 598; C., B. & Q. Ry. v. Warner, 123 Ill. 49; Ch., St. L. & P. Ry. Co. v. Hutchinson, 120 Ill. 589; Fortune v. Jones, 30 Ill. App. 116.

The second of plaintiff's instructions is erroneous because it also contains a clear but covert intimation from the court that defendants were guilty of a "wilful failure."

See authorities cited at paragraph No. 2, *supra*. Especially is this instruction erroneous for predicating liability of a failure to supply cap-pieces when there is not one particle of evidence in the record that any demand was ever made for or

a refusal to supply cap-pieces. Instructions must be based on evidence. Ch., R. I. & P. Ry. v. Felton, 125 Ill. 458; Alexander v. Mt. Sterling, 71 Ill. 366; Bullock v. Narrott, 49 Ill. 62; Ry. Co. v. Lewis, 109 Ill. 122; Railroad Company v. Bragonier, 119 Ill. 53; I. C. Ry. Co. v. Benton, 69 Ill. 175; Snow v. Wiggin, 19 Ill. App. 542; Roberts v. Carter, 31 Ill. App. 142; Lutterell v. Caldwell, 31 Ill. App. 30; Price v. Hay 29 Ill. App. 552; Star Milling Co. v. Thomas, 27 Ill. App. 141, and cases cited; Sterling v. Merrill, 124 Ill. 522.

This instruction contains a covert and ingenious intimation to the jury that defendants were guilty of a wilful violation of duty. This is unfair and unwarrantable. Goodkind v. Rogan, 8 Ill. App. 416.

In C., B. & Q. R. Co. v. Warner, 123 Ill. 49, the Supreme Court say: "It is, strictly speaking, never within the province of the court to tell the jury that an ultimate fact is proven from the existence of given, evidentiary facts." There was a clear-cut issue of fact made by the pleadings as to plaintiff's employment, and contested as a fact all the way through the trial, but the court abandoning that issue, changed the name of the mooted question and made short work of the matter by deciding the very fact as a pure question of law. As further condemnatory of this vicious instruction, see Town of Evans v. Dickey, 117 Ill. 292; Chichester v. Whiteleather, 51 Ill. 259; Tascott v. Grace, 12 Ill. App. 639; Cicotte v. St. Anne's Church, 60 Mich. 559; C. & E. I. R. R. Co. v. O'Connor, 119 Ill. 588; Village of Warren v. Wright, 103 Ill. 299; Myers v. I. & St. L. Ry. Co., 113 Ill. 386; City of Aurora v. Pennington, 92 Ill. 564; Coon v. The People, 99 Ill. 368; Chicago & N. W. Ry. Co. v. Moranda, 108 Ill. 576; Chambers v. The People, 105 Ill. 417; Wilson v. Bauman, 80 Ill. 493; Olsen v. Upsahl, 69 Ill. 273.

Messrs. E. J. PEMBERTON and PRENTISS & BAILY, for appellee.

The first, second and ninth instructions, they say, assume or intimate that the defendants "wilfully failed," or were guilty of a wilful violation of duty, etc., and counsel having made

Kerr v. Hodge.

this assertion cite a "cartload" of authorities to show that any assumption or intimation from the court is always prejudicial error. Upon an examination of these instructions it is at once apparent that neither of them is justly amenable to the charge made. "Such wilful failure" used in the latter part of the first instruction plainly refers right back to a former part of the instruction and could not mislead any man of ordinary understanding. There might possibly have been a time when the average jury might have been unable to understand plain English, but that time has passed in this part of Illinois. But if, by any possibility, any of the jury should discover an intimation from the court as to whether any fact in controversy did or did not exist or had been proven, the twelfth instruction given for appellants flatly and pointedly disabuses their minds of any such idea. *Lawrence v. Hagerman*, 56 Ill. 68.

The fourth instruction given for appellee is charged with being palpably erroneous because they say the court usurped "the province of the jury by the specious attempt to metamorphose a question of fact into a question of law." We think counsel wholly fail to catch the import of that instruction. In effect it simply construes the meaning of the word "employed," as used in the enacting clause and elsewhere in the statute. The word evidently is not used in the sense of hired to work, but in the sense of engaged. Persons lawfully there and lawfully doing anything therein, whether hired or not, would be "employed" in the mine within the meaning of the statute. And if any such person while so "employed" in the mine should be injured by reason of any wilful violation of any of the provisions of the statute by the owner or operator of the mines, such owner or operator would be liable in damages. This instruction might possibly have been unnecessary, because we think it wholly immaterial whether Perry Hodge was working there at all or not. If he was lawfully there with the consent and knowledge of the Kerrs, that was enough. But appellant's counsel were endeavoring, as was apparent in their examination of John Kerr, and in fact all through the case, to make it appear that because Perry Hodge

had not been by regular contract hired to mine coal, that the Kerrs could not be made liable in any event for any injury received by him while in the mine. For this reason this instruction was asked. It is much more favorable to appellants than they were entitled to, but they can't be heard to complain of this.

Complaint is made of the eighth instruction for appellee. That is certainly the law as given. *City of Chicago v. Keefe*, Adm'r, 114 Ill. 222; *Thurber v. Railroad Co.*, 60 N. Y. 326.

CONGER, P. J. This was an action on the case brought by appellee against appellants under Secs. 14 and 16 of an act approved June 16, 1887. Session Laws of 1887, page 235.

Sec. 16 is as follows: "The owners, agent or operator of every coal mine shall keep a supply of timber constantly on hand, of sufficient length and dimensions to be used as props and cap-pieces, and shall deliver the same as required, with the miner's empty car, so that the workmen may at all times be able to properly secure said workings for their own safety."

The declaration alleged a failure on the part of appellants to perform this duty, by reason of which appellee was injured; and upon a plea of not guilty, trial was had resulting in a verdict and judgment for appellee for \$850.

The question whether appellants had supplied props and cap-pieces in accordance with the spirit of the law, was one of the vital questions in the case.

Upon this question, especially, the evidence of both the appellants was all important, and a strong effort was made upon the trial, by appellee, to break down their credibility before the jury, by showing that they had made statements on former trials inconsistent with their statements made on the present trial. It was therefore of the utmost importance that the jury should be correctly instructed upon this question, so that they might determine, under the rules of law, what weight and credence to give to the various witnesses. Under these circumstances the court gave to the jury, on behalf of appellee, the following instruction:

16. "The court instructs the jury that one of the methods

of impeaching a witness is to show by competent evidence that such witness has made a statement or statements out of court, or in court at another time, contrary to, or different from his testimony in the case in which he testifies as a witness in some matter material to the issue in the case on trial; and in this case, if you believe from the evidence that any witness has been successfully impeached, you have a right to disregard the entire testimony of such witness, except in so far as his testimony may be corroborated by other and credible evidence in the case."

We have no doubt that the jury would understand this instruction to mean that if any witness had been impeached in the particular manner pointed out in the first part of the instruction, then they were at liberty to disregard the entire testimony of such witness, except, etc., in so far as corroborated.

Appellee insists that this instruction is correct, and refers to Greenleaf on Evidence, Sec. 462, where it is said: "The credit of a witness may also be impeached by proof that he has made statements out of court, contrary to what he has testified at the trial." Appellee also refers to several cases in the Supreme Court, where the same general rule is laid down.

The above rule is sound, for it probably always affects the veracity or the memory of a witness to prove former contradictory statements. *Craig v. Rohrer*, 63 Ill. 325.

Hence it is always proper to permit such proof to go to the jury and to tell them to consider it in determining what credit and force shall be given to a witness under such circumstances. But this instruction tells the jury that if a witness has made previous statements contrary to or different from his testimony on the witness stand, in a material matter, the entire evidence of such witness is to be disregarded, except in so far as it may be corroborated by other credible evidence.

Under this instruction the jury would have no right to consider whether the former statements were made inadvertently or under an honest mistake as to the facts; but must, under such circumstances, sweep his testimony aside the same

as though they were to believe that the witness had wilfully and intentionally committed perjury. This is not the law.

The jury might have been told that contradictory statements should be considered by them in determining the weight and credit to be given to any witness, but they should not have been told that they could rightfully disregard the entire testimony of a witness for that reason, unless such witness makes them wilfully, or that the false statements must be knowingly made. *McClure v. Williams*, 65 Ill. 390; *Pollard v. The People*, 69 Ill. 148; *Linck v. Whipple*, 31 App. 155.

The seventeenth instruction given appellee is as follows:

17. "The court instructs the jury that if you believe from the evidence in this case that any witness has wilfully testified falsely to any matter, material to the issue in the case, you have the right to wholly disregard the testimony of such witness, except in so far as such witness may be corroborated by other credible evidence in the case."

This instruction does not, in our opinion, cure or avoid the vice of the sixteenth. The jury would naturally conclude that they referred to different questions, and while the seventeenth is good law, its probable effect upon the jury would be to make the sixteenth more dangerous and vicious than it would have been alone.

The jury might reasonably conclude that as the seventeenth required wilful perjury on the part of a witness to discredit him entirely, the sixteenth did not, but only that contradictory statements upon material questions should be shown.

We can not think, that under this sixteenth instruction, appellees have had a fair trial, or that justice has been done them, and therefore the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

CHARLES SUNDMACHER
V.
DAVID J. BLOCK ET AL.

39	553
59	39
39	553
169	118
39	553
86	511

Innkeepers — Fraud on—Pleading — Evidence — Practice — Malicious Prosecution—Probable Cause—Trespass.

1. An arrest by a private person without process is a trespass, if no criminal offense was committed or attempted in his presence, whether he had probable cause or not, to believe the person arrested guilty, and counts in trespass in the declaration in an action based thereon need not contain the averment that the alleged arrest was "without any reasonable or probable cause."

2. The rule that the proofs must correspond with the allegations in a declaration applies only to such as are material in themselves, or being immaterial, are yet so interwoven with what are material as to make the latter depend upon them and thus expose both to a traverse.

3. Under counts charging malicious prosecution, the burden is upon the plaintiff to prove a want of probable cause for a criminal prosecution.

4. A defendant should not in such case, there having been probable cause, suffer substantial damages although the manner of the original arrest was humiliating and offensive.

5. An action of trespass may be supported against a person, not being an infant or *feme covert*, who afterward assents to a trespass committed for his benefit.

6. Also against all who aided or abetted in committing the same.

7. No prosecution can be maintained under the act touching frauds upon innkeepers, for a refusal to pay for something which has not been "obtained."

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. BROWN, WHEELER & BROWN, for appellant.

A private person can not justify an arrest upon the ground of suspicion of guilt only; guilt in such case must be shown. *Dodds et al. v. Board*, 43 Ill. 95; *Kindred v. Stitt et al.*, 51 Ill. 401; *Cooley on Torts*, top page 201, 202.

There is no pretense that the defendants were officers or that any warrant had been issued when the arrest was made.

If the defendants sought to justify the arrest because a criminal offense had been committed in their presence, it was necessary for them to plead it; also, if they would justify the assault made upon the plaintiff, for the same reason they should have presented it by plea. So far as this record discloses, the arrest of the plaintiff in the first instance was without authority of law, and the court clearly erred in refusing the 7th and 8th instructions asked for by the plaintiff. *Shanley v. Wells*, 71 Ill. 78.

On the merits of the case, the verdict should have been against the defendants. Passing all other questions, we contend that the plaintiff made out his case and sustained it by the weight of the evidence. The arrest of the plaintiff was, as the evidence abundantly establishes, causeless and groundless. He had committed no offense, and the effort of the defendants to collect the unjust and paltry demand by brute force and the employment of the power of the State under the guise of the criminal code, can surely find no sanction in a court of law. Was there, or could there have been a reasonable suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty of the offense charged? Unless there was such a reasonable suspicion, there was no probable cause for his arrest. *Angelo v. Faul*, 85 Ill. 106.

Whether the facts in proof constitute probable cause for commencing a criminal proceeding, is a question of law. *Wade v. Walden*, 23 Ill. 425.

Messrs. PATTON & HAMILTON, for appellees.

No rule of law is better settled than that in an action for a tort there can be no recovery against two or more tortfeasors unless they are jointly liable for the tort complained of; all defendants sued together must be liable jointly, so that a joint judgment may be entered against all. *Shields v. McKee*, 11 Ill. App. 188; *Dalby v. Young*, 3 Ill. App. 39.

Therefore the verdict was right and could not have been otherwise than what it was. Because the evidence conclusively showed that the defendants, if liable at all, were not

Sundmacher v. Block.

liable jointly for either or both torts complained of, hence the verdict and judgment must have been for the appellees, even if both causes of action had been proven.

Again we suggest that it was impossible for the court to have given the 7th and 8th instructions asked by appellant.

The court instructed at appellant's instance that if the jury believe that the appellees maliciously and without probable cause arrested or caused the arrest and imprisonment of appellant, then appellees were liable. This instruction, we think, is bad, because there is no evidence to support it; but appellees are not complaining of it. But having given this instruction, how could the court, as against all the appellees, instruct that a recovery might be had against all of them if they arrested and detained the appellant or caused it to be done, without warrant, etc. Such instruction would have been erroneous, because there was no evidence to show that Block, Sr., had anything to do with the arrest or detention which took place, previous to the swearing out of the warrant. To have given the 7th and 8th instructions asked, would have authorized the jury to allow damages for a tort by Block, Jr., and Jones, and also damages for a distinct tort by Block, Sr., in the same suit. *Daly v. Young, supra.*

The complaint of the modification of appellant's 5th instruction is, we think, without foundation. As asked, it put appellee's liability wholly upon the ground that they did not believe in good faith that appellant was guilty. The court so modified it as to require that the appellees must have been actuated by malice. This was right. It is the settled doctrine of our Supreme Court that, in order to maintain an action for malicious prosecution, there must be both malice and want of probable cause. Both must concur; though malice may be inferred from want of probable cause, probable cause can not be inferred from malice. *Mitchinson v. Cross*, 58 Ill. 366; *Leidig v. Rawson*, 1 Scam. 272; *Ross v. Innis*, 35 Ill. 505; *Chapman v. Cawrey*, 50 Ill. 512.

Malice is not a legal presumption from the want of probable cause. It is for the jury to find from the facts, when there was no probable cause, whether there was malice or

not. The defendant in this class of actions may not be able to show probable cause, but he may be able to rebut any presumption of malice. *Hirschi v. Metteman*, 7 Ill. App. 112; *Russell v. Deer*, 7 Ill. App. 181.

In *Hurd v. Shaw*, 20 Ill. 350, the court say: "We are inclined to the opinion that an action for a malicious prosecution, unless actual malice be proved, should not prevail in any case where the merits have not been tried and a verdict pronounced." See, also, *Ross v. Innis*, 26 Ill. 259; *Wicker v. Hotchkiss*, 62 Ill. 107; *Ames v. Snider*, 69 Ill. 376; *Anderson v. Friend*, 71 Ill. 479; *Same v. Same*, 85 Ill. 135.

In *Splane v. Byrne*, 9 Ill. App. 394, the court say: "To constitute malice there must be something more than mere spite or hatred; there must be *malus animus* showing that the party is actuated by improper and indirect motives."

PLEASANTS, J. The facts out of which this suit arose occurred on the 19th and 20th days of November, 1889, during which the Grand Lodge of Odd Fellows was in session at the city of Springfield. Appellees were respectively proprietor, clerk and watchman of the Palace Hotel in that city. Appellant, with two friends, all of Murphysboro, Ill., attending the session, in the afternoon of the 19th applied to the clerk for accommodations at the hotel and were registered and assigned to a room together. Appellant was furnished with a card or ticket, as follows: "Hotel Palace; meal and room ticket; C. H. Sundmacher; room 10; arrived at supper the 19th; guests will please present this ticket at dining room for meals and at office for key to room, and return the same to the cashier on settlement of account." On the back of it was the following: "Guests will be charged full rates from the time of taking rooms, including meals being served at the time of departure; no allowance made for absence from meals." The other two gentlemen received tickets differing only in the name of the guest. They had supper and occupied the room that night. In the morning, a few minutes after the dining room was open and guests were going in, appellant went up to the counter in the office and

laid down a dollar, saying to the clerk that he wanted to pay for his supper and room, the regular charge for which was one dollar. His companions did the same. The clerk claimed that each should pay a half dollar more, being for breakfast. They said they hadn't had breakfast and didn't want it, and declined to pay for it. After some words back and forth they started out leaving the money on the counter. As they were leaving the clerk said he thought he would find a way to make them pay, or to that effect, and appellant replied, "very well, you'll find us at the State House." The clerk then called Jones, the watchman, and told him to stop those men; that they had refused to pay their bill. Jones followed them out to the sidewalk, and there, in front of the hotel, and in the presence of a large number of persons, arrested appellant and one of his companions. After a little he took his hand off the other, but with considerable force held appellant, who had made some show of resistance, against the wall of the building. Direction was given by somebody to send for the patrol wagon. In about ten or fifteen minutes it appeared with two policemen. Block, Jr., pointed out the two men to the policeman, and Jones told him to take them. The officer asked, "What have these men been doing?" and Block answered, "They refused to pay their bill, and we will appear against them when father gets up." Appellant was placed in the wagon and his companion followed. They were driven to the city jail or calaboose, searched and put in a cell.

The elder Block had not arisen when these occurrences took place. On coming down from his room and learning of them in a general way, between seven and eight o'clock, he went to the calaboose to see them. He says he asked them if they were Odd Fellows, and being told they were, said he was very sorry this thing occurred; sorry he was not up; that if he had been, he didn't think it would have happened. "I said, 'We have a different way of settling matters,' and this gentleman (referring to appellant) spoke up in a very pompous kind of way and says, 'We don't propose to talk about this matter at all; I am a lawyer and know my rights; all we want

Sundmacher v. Block.

is counsel and would like to see Judge Allen;' and I said 'Gentlemen, if that is all, that is all right.' And I turned to Mr. Alyea and says, 'be kind enough to extend to these gentlemen any courtesy you can,' and I walked out and went over to the squire's office, thinking that was the best thing I could do to protect my son and house from further trouble; and to show I had some cause for this arrest, I swore out a warrant." On cross-examination he stated that when he made the complaint he did not know they had paid for supper and lodging and didn't want any breakfast; and that he told the magistrate not the particulars but simply that they had refused to pay their bill. On his return to the hotel he learned the facts. And further, "I went there (to the calaboose) in the spirit of an Odd Fellow to help them out, and after I saw the vindictive spirit manifested by that fellow, both as a Mason and Odd Fellow, I concluded I would go right over and swear out a warrant and protect myself. I saw he was vindictive, that was his spirit, and I took the initiatory step."

The warrant was served and appellant taken before the magistrate about half past nine o'clock. They wanted an immediate hearing, but Mr. Block was on the Odd Fellows' reception committee, preparing for a parade, very busy otherwise and had no attorney. The hearing was postponed to the afternoon, the prisoners being discharged in the meantime on their own recognizance. In the afternoon the complaint was heard, occupying several hours. Each of the appellees and several other witnesses testified, and the prisoners were discharged.

Appellant thereupon brought this suit. The declaration was in four counts—two in case, for malicious prosecution upon the charge of obtaining food, lodging and accommodations from the Palace Hotel, with intent to defraud the keeper thereof, and two in trespass, charging that defendants, on, etc., at, etc., with force and arms made an assault upon the plaintiff, and seized and laid hold of him, and compelled him to enter the police patrol wagon, and to go to police headquarters, and there imprisoned him, and kept and detained him there "without any reasonable or probable

cause," for a long space of time, to wit, twelve hours, against the peace of the people of this State.

"Not guilty," was the only plea interposed; upon which a trial was had, resulting in a verdict for the defendants. A motion for a new trial was overruled and judgment entered upon the verdict against the plaintiff. Exceptions were duly taken.

The theory of the case as presented on behalf of appellees is, that appellant, by his pleading, assumed the burden of proving a want of probable cause for the original arrest, carriage to and detention at the city prison, being the wrong complained of in the trespass counts, as well as for the prosecution on the warrant afterward sworn out; that whether there was or was not a want of probable cause was a question for the jury; that the evidence was sufficient to support a finding that there was no want of probable cause for the alleged wrongs, and also that the evidence failed to show a joint liability of the defendants for the acts set forth in either of the counts, but on the contrary positively proved, that even if they had been wrongful, Block, Sr., was not liable for the original arrest, nor the other defendants for the prosecution on the warrant.

It is conceded that the counts in trespass would have been just as complete, good and sufficient statements of the cause of action, without the averment that the alleged arrest was "without any reasonable or probable cause." Having been made by private persons without process, it was a trespass, if no criminal offense had been in fact committed or attempted by appellant in their presence, whether they had or had not probable cause to believe him guilty. Sec. 342, Chap. 38, R. S.; *Kindred v. Stitt*, 51 Ill. 401; *Dodds v. Board*, 43 Id. 95. The want of probable cause was not an element of the wrong, nor of essential description of it, but at most of aggravation only, and its existence would have been no justification to defendants. The averment was therefore unnecessary. Defendants could not properly traverse it, nor was plaintiff bound to prove it. *Stephens on Pleading*, side pp. 217-41-43; Chap. 1., Pl., side p. 229, 611-12; *Burnap v. Wight*, 14

Ill. 301; Quincy Coal Co. v. Hood, 77 Id. 72. The rule that the proofs must correspond with the allegations applies only to such as are material in themselves, or, being immaterial, are yet so interwoven with what are material as to make the latter depend upon them and thus expose both to a traverse. Here the statement of the cause of action is not at all interwoven with or dependent upon the allegation in question. It may be stricken out entirely, as surplusage, without impairing or changing the legal effect of these counts. 1 Greenl. on Evidence, Sec. 51, and authorities, *supra*.

It is said that by the instructions given for him, appellant was committed to the proposition that the maintenance of his case under those counts required proof on his part of the want of probable cause for his arrest. And it is true that these instructions do not all in terms distinguish the counts in trespass from those in case. We think, however, that of those referred to, the second, third and sixth are applied with sufficient clearness to the latter only. But appellant should not be estopped by the others, if their application also was made clear by instructions refused. The fifth and seventh as asked did in terms apply to the arrest without process, and exclude the want of probable cause as an element of the wrong therein stated. Had they been given, it would have been clear that those which included it referred only to the counts in case. Appellant is therefore not estopped to complain of their refusal, if they stated the law correctly. That they did is hardly denied.

Nor is any reason perceived for refusing the ninth. And so, also, as to the tenth, since the third given, which defined probable cause in substantially the same way, did not state the charge in question to which it applied and which might have materially aided the jury in understanding the definition.

But we have not thought any of these questions relating to the counts in trespass of sufficient importance in this case to demand a very careful consideration. It is agreed that under the others the burden was upon appellant to prove a want of probable cause for the criminal prosecution. If he failed to

prove it, if there was probable cause, then the wrong of the original arrest and detention was more technical than substantial. It was really the beginning of the prosecution, and although the manner of it was very humiliating and offensive, yet if the prosecution was not without probable cause the defendants should not suffer substantial damages. But the main reason is that however these questions should be decided, if it were clear that by the law or under the pleading the burden of showing a want of probable cause for the original arrest was also upon the plaintiff, he did show it beyond a reasonable doubt. On this question the evidence is all one way. The testimony of the defendants alone was conclusive, showing it to be a moral certainty. Not a single circumstance appears which tends in the least degree to the contrary.

It happens in this case, as it rarely does where this question is involved, that every fact needful to its determination is proved and undisputed. Usually there is a want or a conflict of evidence, or it is circumstantial and inconclusive as to some facts to be found in order to determine whether the offense charged was committed, or the party charged committed it, and as to which an inference or conclusion either way might not be unreasonable; or the defendant may have been excusably ignorant of some material fact. In such cases the question of probable cause is one of fact for the jury to find. Not so here. The facts upon which it was to be determined whether the offense charged had been committed were all so known, and of such a character as to present to the defendants only a question of law; and since this so appeared on the trial, the same question was there presented. If these facts were known to the defendants and showed that it had not been committed, they could not have had probable cause for the arrest and prosecution of the plaintiff. If they were ignorant of the terms of the law, or mistaken in their opinion of its meaning, that was their misfortune if not their fault, of which they and not the plaintiff should bear the consequences.

The statute under which the prosecution was instituted is as follows:

"Sec. 1. Be it enacted," etc., "that any person who shall obtain food, lodging or other accommodation at any hotel, inn, boarding or eating house, with intent to defraud the owner or keeper thereof, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding \$100, or imprisonment in the county jail not exceeding thirty days.

"Sec. 2. Proof that lodging, food or other accommodation was obtained by false pretense * * * or that the party refused or neglected to pay for such food, lodging or other accommodation on demand * * * shall be *prima facie* proof of the fraudulent intent mentioned in section one of this act." Sec. 155 a, 155 b, pp. 480-1, Chap. 38, Hurd's R. S., 1889.

The accommodation in question, on account of which appellant was arrested and prosecuted, was breakfast on the morning of November 20, 1889. That is proved, admitted and certain. No claim was or is made in respect to any other. And it is just as fully proved, admitted and certain that he did not "obtain" it; that the defendants who ordered and made the original arrest then knew he had not "obtained" it; and that the defendant who afterward swore out the warrant further prosecuted his complaint after he also knew it. It is even conceded that these proceedings against him were begun and continued because he refused to obtain it and therefore refused to pay the fifty cents demanded for it.

To "obtain" is "to get hold of," to "obtain possession of," "to acquire," to "maintain a hold upon," to "keep," to "possess." To contract for, does not approach it in meaning. (Webster's Dictionary.)

And yet it is said the jury were warranted by the evidence in finding that there was probable cause for the arrest and prosecution under this statute, and that the court did not err in refusing to set aside that finding.

The clerk testified that when they applied for a room he asked appellant how long they were going to remain, and he answered that he was not positive, but he would be there until after breakfast, and the other two men would remain

during the session of the grand lodge. Appellant and his companion, Watson, the only other witnesses to that point, relate appellant's statement as to himself differently, as having been that he was going away at six o'clock, or early in the morning, without reference to breakfast. But if his statement was as given by the clerk, the fact remains that he did not obtain the breakfast. Nor can it be held that there was a contract, as to either, that he would positively remain for any definite time. They were transients, whose present purposes in that regard, though stated as represented, would not be contracts for the time mentioned, but lawfully changeable at their option for any reason thereafter arising. Nor, if they were contracts would it affect the question under consideration. This statute is not to be extended by any liberality of construction in favor of innkeepers; and we hold that in no proceeding under it is the civil liability of the guest for any accommodation not actually "obtained" at all pertinent. If he definitely contracted to remain for a week, and left without fault of the innkeeper, at the close of the first day, paying or tendering payment for all that he had actually obtained, evidence of his refusal to pay for the further time contracted for would not be admissible as tending to prove an offense, or probable cause for a prosecution, under this act. Nor should the jury be permitted, upon either of those issues, to consider whether or not the accommodation actually obtained was better, in view of what was further contracted for, than it otherwise would have been, if payment for it was made or tendered according to its actual value or regular price. The innkeeper will not be allowed to claim that if he had understood the guest was to remain only a day instead of a week, he would or might have been furnished a meaner room, any more than that there would or might have been less of benignity in the smiles of the clerk or of alacrity in the responses of bell boys or the movements of table waiters. Having peculiar rights they are subject to peculiar obligations.

Upon the remaining question we are of opinion that all of the defendants were liable for both the original arrest and the subsequent prosecution.

As to the original arrest, David J. Block, Jr., ordered it and Jones made it. It is elementary law that this action "may be supported against a person, not being an infant or *feme covert*, who afterward assents to a trespass committed for his benefit." 1 Chitty on Pl., side p. 180. It was made for the benefit of Block, Sr., and if he did not assent to it we do not know what would amount to an assent.

As showing that he did not, it is said that at the calaboose he expressed to the prisoners his regret at what had occurred. Had this been on account of an admitted wrong to them, it was wholly in his power to right it so far as that could be done by having them at once discharged, and was a concession of the propriety of appellant's insistence on having counsel. His regret was not expressed until he had ascertained what he probably already had some reason to suppose, that they were Odd-Fellows—and from his own statement there appears to have been no occasion for his regret except that they had committed a crime and that it reflected upon the order; for he had been informed and believed that they had obtained food and lodging at his hotel and refused, without reason, to pay their bills. Even in this view it is difficult to refrain from smiling at the queer picture he presents of himself. This intended victim of their fraud, indignant at their vindictiveness and impudence in threatening to have a lawyer, bespeaking of the calaboose keeper his extension to "these gentlemen" of all possible courtesies, and hurrying off to swear out a warrant against them. But if his intention when he went to the calaboose was really to repndiate the act of his son and watchman, he then changed it. He "walked out and went over to the squire's office, thinking that was the best thing he could do *to protect* his son and house from further trouble; and to show that he had some cause for this arrest, he swore out a warrant." Such is his own testimony. After doing this and learning the facts of the case more fully, he employed counsel, produced witnesses, including his son and his watchman, and prosecuted his complaint. It is idle to contend that this was not an assent to and a ratification and adoption of their acts. It is equally

Dines v. The People.

clear that they took part, as aiders and abettors, in the prosecution. They ordered and made the arrest for the purpose of prosecuting. The son told the policeman who took the plaintiff to the calaboose, in the presence of the watchman, that they would appear against him when his father got up. This was their own expression of their own purpose, before they had conferred with his father about it; and they did so appear.

We think the verdict was not only unsupported by any evidence whatever, but was clearly contrary to it and to the law, and should have been set aside. The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

CHARLES W. DINES

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Contempt—Clerk of County Court—Order of Court—Ignorance of—Judicial Notice.

1. In proceedings against a clerk of court for contempt, he having failed to obey an order thereof touching one of his official duties, it must be shown to convict him, that he wilfully intended to disobey or obstruct the same.

2. It will not be necessarily presumed in such case, that the clerk knew the contents of such order when he filed the same.

3. A court can only take judicial notice of such acts and proceedings as will properly go upon the record; and the knowledge, opinion or recollection of the judge in such case, that the clerk did know the contents of the order, is his personal and not his judicial knowledge.

[Opinion filed June 12, 1891.]

IN ERROR to the County Court of McDonough County; the Hon. L. Y. SHERMAN, Judge, presiding.

Messrs. NEECE & SON and PRENTISS & BAILY, for plaintiff in error.

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MESSRS. GEORGE D. TUNNICLIFF, State's Attorney, and H. C. AGNEW, for defendants in error.

CONGER, P. J. This was an information against plaintiff in error in the County Court for contempt in destroying certain ballots in his custody in violation of an order of the court to preserve the same. The order was made in a cause in said court of The People v. Charles Newton Wilson, wherein he was charged with fraud at an election.

Plaintiff in error was clerk of the County Court, and at the December term, 1888, of said court, upon the application of the State's attorney, a written order was signed by the judge of said court, and filed in the papers in the case of The People v. Wilson, by plaintiff in error, in which written order he was ordered not to destroy certain poll books and ballots, but to carefully preserve them until the further order of the court.

At the June term, 1890, of the County Court, the present information was filed, interrogatories propounded to plaintiff in error, which he answered under oath; the fourth and its answer being as follows:

Fourth: "If you have destroyed said ballots, state why did you destroy them in violation of the order of this court?"

Answer to interrogatory fourth: "I destroyed said ballots because it was my sworn duty to do so under the statute of the State of Illinois. The paper purporting to be an order was never read or understood by me until January, 1890, although the same was filed by me. At the time of filing I did not know what said paper contained, and never knew the contents thereof until the month of January, A. D. 1890. In destroying said ballots I meant no contempt of this court, but was only aiming to carry out my duty as clerk of this court, as I understood it. C. W. DINES."

"Subscribed and sworn to before me this 23d day of June, A. D. 1890.

[SEAL.]

W. H. NEECE, Notary Public."

On the 27th of June, 1890, the following order and record are made by the County Court:

Dines v. The People.

“THE PEOPLE OF THE STATE OF ILLINOIS }
vs. } Contempt.
CHARLES W. DINES. }

And now on this 27th day of June, A. D. 1890, it being one of the days of the June term of said court, A. D. 1890, comes the defendant, Charles W. Dines, in his own proper person as well as by his attorneys, and this case having been heard upon the information, the written interrogatories filed herein, and the answer of the defendant to said interrogatories, and the court having heard the arguments of attorneys, and being fully advised in the premises, and on consideration thereof, doth find that this court did, at the December term, A. D. 1888, of this court, make an order, containing among other things an order that said defendant should be and he was enjoined and inhibited from destroying or in any way interfering with the ballots therein mentioned, and that said defendant should carefully and safely preserve said ballots until the further order of this court, and fail not under pains and penalties of being in contempt of this court; and it further appearing, and this court takes judicial notice, that said order was made in open court at said December term, A. D. 1888; and that said defendant, Charles W. Dines, was then and there personally present in open court when said order was made, and that said defendant, at the time and place aforesaid, was informed by this court, and he then and there well knew that said order was made and the contents thereof; and the court further finds from the interrogatories and answers thereto, that the said defendant destroyed the ballots mentioned in said order, after said order was made, and in violation and disobedience thereof."

Whereupon the court adjudged plaintiff in error to be in contempt and fined him \$200, which judgment plaintiff in error seeks to have reversed.

From the sworn answer of plaintiff in error it appears that while he filed the written order, he did not know its contents until after he had destroyed the ballots, as he supposed, in accordance with his duties under the law. If this answer is to be taken as the truth, it is clear that he was not guilty of contempt.

Plaintiff in error might be presumed to know the orders and proceedings of the court, of which he is clerk, in so far as any person might be damaged by reason of his ignorance, and it may be, that in such cases he would not be allowed to plead his ignorance; but in a proceeding like the present for contempt, there must exist a wilful intention to disobey, or obstruct the orders of the court. In other words, there must be an intention to do a wrong.

The only question we shall consider is, was it within the power of the court to take judicial notice that plaintiff in error, "was then and there personally present when said order was made, and that said defendant (plaintiff in error), at the time and place aforesaid, was informed by this court, and he then and there well knew that said order was made and the contents thereof."

Of what facts will a court take judicial notice? Of the signatures of their own officers, their own judgments, and orders, whether a bill of exceptions has been signed by the judge, and various other matters. The rule which seems to us to govern in the present case is thus laid down in Wharton, and approved in *Secrist v. Petty*, 109 Ill. 188:

"The doctrine is well recognized that a court will take judicial notice of the state of the pleadings, and the various steps which have been taken in a particular cause, and consequently the judge must take notice of his own *official acts* in the progress of such a case, and he therefore needs no proof to advise him of what he has done in it." What are official acts? We think they are such only as would form part of the record.

A court can only take judicial notice of such acts and proceedings as would properly go upon the record. Hence, the fact that the order was made when it was filed, and its contents, were all proper subjects of judicial notice; but the knowledge, opinion, or recollection resting in the breast of the judge that the clerk did know the contents of the order could not be made a part of the record, and hence was merely his personal and not his judicial knowledge.

We do not mean to be understood that the court can only

Conn. Mut. Life Ins. Co. v. Smith.

take judicial notice of such acts and proceedings as are actually recorded. Mere verbal orders may be given by the judge, which are never placed upon record, and for the disobedience of which one might be punished as for contempt. But all such orders and proceedings could properly be placed upon the record of the court, if necessary, and usually would be, if proceedings in the nature of punishing for contempt were to grow out of them.

For the error indicated the judgment of the County Court will be reversed, and the cause remanded.

Reversed and remanded.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY
V.
EMMA F. SMITH, ADMINISTRATRIX.

Life Insurance—Policy—Conditions in —Breach of—Habits of Intoxication—Suicide—Pleading—Evidence—Instructions.

In an action brought to recover upon a life insurance policy, the defendant contending among other things that assured died a suicide, and that the plaintiff is entitled to recover only an amount named, this court holds as proper the rulings of the trial court touching the defendant's demurrer to the first replication to the defendant's third plea; likewise as to receiving evidence under the second replication to said plea; and declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Tazewell County; the Hon. N. W. GREEN, Judge, presiding.

Messrs. ISHAM, LINCOLN & BEALE, for appellant.

Messrs. WILLIAM DON MAUS and W. R. CURRAN, for appellee.

CONGER, P. J. This was a suit upon a life insurance policy issued November 23, 1880, by appellant, upon the life of Conrad H. Smith, the husband of appellee.

To the declaration appellant filed the plea of general issue, and two special pleas, as follows:

“Second plea, *actio non*, etc., that one of the provisions of said policy of insurance in the said declaration mentioned, was, that if the insured should die in a state of drunkenness, or from any disease in any degree resulting from the occasional or habitual use of alcoholic or narcotic stimulants, or should thereby injure or impair his health, whether permanently or temporarily, then in each and every of the foregoing cases said policy should become null and void; and the said defendant avers that said insured, Conrad H. Smith, did injure and impair his health by the use of alcoholic stimulants, by means whereof the said policy of insurance in the said declaration mentioned became null and void, and that it, the said defendant, is not liable to the said plaintiff thereon, and this the defendant is ready to verify, etc.”

“Third plea, *actio non*, etc., that one of the provisions in said policy of insurance in the said declaration mentioned, was that the self-destruction of the insured, whether voluntary or involuntary, and whether he should be sane or insane at the time thereof, was not a risk assumed by this company under its contract, but that in every such case, the company should pay in manner and form as provided in the policy a certain sum constituting the so-called net reserve upon the policy, computed as therein stated, which should be deemed to be payment in full of all liability by reason of said contract; and the said defendant avers that the said insured, Conrad H. Smith, did die by an act of self-destruction within the aforesaid provisions, to wit, by poisoning himself, by means whereof the liability of said defendant upon the said policy of insurance in the said declaration mentioned, has become and is so far reduced that the said defendant is liable to said plaintiff thereon only to the amount of the net reserve already mentioned, which amount is readily ascertainable by a mathematical calculation upon the mortality tables named in said policy,

and which amount the defendant is ready and willing and now offers to pay, and this the defendant is ready to verify, etc.”

First replication to second plea, that the insured, Conrad H. Smith, did not injure or impair his health by the use of alcoholic stimulants in manner and form as in said second plea averred, and of this the said plaintiff puts herself upon the country, etc. *Similiter* by defendant.

Second replication to the second plea, that before and at the said time when, etc., in the second plea mentioned, with full knowledge that the said Conrad H. Smith used alcoholic stimulants as in second plea is alleged, the said defendant solicited the payment of the annual premiums upon said policy of insurance, and collected and received the same as the same became due and payable, and thereby the said defendant then and there waived the observance or performance by the said Conrad H. Smith of the said condition and provision in the second plea mentioned, and this the plaintiff is ready to verify, wherefore she prays judgment, etc. General rejoinder to second replication to second plea.

First replication to third plea, that the said Conrad H. Smith did not at the time, when, etc., purposely or intentionally poison himself and therefrom die, by an act of self-destruction in manner and form as in said third plea is alleged, and of this the said plaintiff puts herself on the country, etc.

General demurrer to plaintiff's first replication to third plea.

Order overruling demurrer of defendant to the plaintiff's first replication to the third plea; election of defendant to abide by its demurrer.

Second replication to third plea, that the said Conrad H. Smith did not come to his death by an act of self-destruction in manner and form as in said third plea alleged, and of this the said plaintiff puts herself upon the country, etc. *Similiter* by defendant. The errors assigned and relied upon by appellant are thus stated in the brief of counsel:

“Differently and concisely stated, the errors complained of by the appellant, are substantially, that the court erred in overruling the defendant's demurrer to the first replication to the

third plea; that it was error to refuse to receive evidence under the second replication to that plea; that the overwhelming weight of the evidence before the jury, and practically all the evidence, is opposed to the general verdict and some of the special findings; that the court should have set aside the verdict and sustained the motion for a new trial; and that upon the whole record, the judgment is so clearly contrary to law and to the weight of the evidence that this court should reverse it." The clause in the policy in reference to self destruction, upon which the third plea was founded, is as follows:

"4th. That the self destruction of the insured, whether voluntary or involuntary, and whether he be sane or insane at the time thereof, is not a risk assumed by this company under this contract; but in every such case the company will pay in manner and form as hereinbefore provided, only the then net reserve upon this policy, according to the Combined Experience Table of Mortality, assuming four per centum compound interest, deducting therefrom any indebtedness on account of this policy, and shall not be deemed or held liable for any greater sum or payment; and the payment of said sum shall be a full discharge of all liability by reason of this contract."

We think the demurrer to the first replication to the third plea was properly overruled. The third plea is to have the same effect and be treated as though it had in express terms charged that Smith had intentionally poisoned himself, and the first replication to that plea was in fact a denial of that charge and properly ended to the country.

The demurrer to this replication was an admission that the deceased did not intentionally poison himself, and when appellant stood by its demurrer, it took that issue out of the case, in the trial court, and hence it was not error for the Circuit Court to refuse the evidence offered under the second replication to the third plea.

Unless the third plea is to have the meaning we have given it, it could form no issue in the case.

If it is meant to assert by such plea when it is said, "the said insured did die by an act of self destruction within the

aforesaid provisions, to wit, by poisoning himself," that it was accidental and not intentional, then the plea would not charge an act of self destruction within the language of the provision of the policy.

It is perversion of language and an absurdity to say that one can destroy himself by accident, and with no intention so to do, unless it should be the direct result of negligence on his part.

If a person accidentally fall into the water and is drowned, or take poison supposing it to be a harmless and proper drink, and thereby dies, no one would think of saying that such person had died by an act of self destruction. *Mutual Life Insurance Co. v. Terry*, 15 Wall. 580; *Life Insurance Co. v. Broughton*, 109 U. S. 121; *Suppiger v. C. M. B. Ass'n*, 20 Ill. App. 602.

Had appellant desired to raise the question before the jury as to whether the deceased intentionally took poison to destroy his life, this replication fairly and substantially presented such issue; but by demurring to it, we suppose appellant desired to insist that the assertion on the part of appellee that the deceased did not take the poison for the purpose or with the intention of taking his life, was no sufficient answer to the third plea.

We have carefully considered all the evidence, and think it was sufficient to warrant the verdict of the jury. The question of waiver set forth in the second replication to the second plea was fairly presented to the jury by the evidence, and we see no good reason for interfering with the conclusion reached by them.

In the oral argument it was urged that appellee's instructions are faulty in not attempting to define what would constitute a waiver. Upon examination we find the same objection, if it be one, in appellant's instructions.

The instructions of both appellant and appellee use the expression, "if the jury believe that the company did, or did not, waive the provision of the policy in reference to excessive drinking," as words well understood and needing no explanation, and we can not believe that appellant has been

injured thereby, or that it has any just ground of complaint upon this point.

We think substantial justice has been done and the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

THE ROCKFORD INSURANCE COMPANY

v.

BENJAMIN F. WRIGHT.

Fire Insurance—Policy—Conditions—Vacancy—Waiver—Evidence—Instructions.

1. A technical defense is valid if supported by the evidence.
2. A building insured as, and leased for a store room, in the process of ordinary preparation—not repair—for such purpose, is not vacant or unoccupied.
3. Where an insurance company has, by its agent, received notice of the vacancy of a building insured therein, and said agent assures the policy holder that it is “all right and we will take care of it,” it can not, in case of loss during vacancy, insist upon the same as a breach of the contract, and thus avoid payment.
4. It is not necessary that every instruction given in a case, should be a full and complete statement of the rules and principles of law involved.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. BROWN & KIRBY, for appellant.

Messrs. MORRISON & WHITLOCK and O. A. DE LEUW, for appellee.

WALL, J. Action upon a policy of insurance. Judgment for plaintiff for \$1,575.

Two questions are presented by the record:

1. Was the property vacant or unoccupied within the meaning of the policy?

2. If it was so vacant or unoccupied, was there a waiver of the objection?

Both questions were solved against appellant by the verdict of the jury.

As to the first we are inclined to the opinion that the conclusion reached was the correct one.

The building was designed for mercantile purposes and was insured to be so used. It had been vacant for some time but was leased to a new tenant who proposed to place therein a stock of merchandise as soon as the room could be cleaned and made ready.

The tenant had possession and was having the room cleaned, and had left in the room the implements and tools used for that purpose. During the night a fire broke out in another part of the square which extended to this building and destroyed it.

It is rather a narrow view that the building, under the circumstances, was vacant or unoccupied. The object of the insurer in stipulating for occupancy is to secure additional vigilance and assistance in preventing and extinguishing fire, and in all cases the occupancy is to be according to the use for which the building is intended. A store room is closed during the night, and had this room been full of goods, there would have been practically the same condition as there was so far as actual occupancy was concerned.

Having been leased for that purpose, and being then in the process of ordinary preparation—not repair—it was not vacant or unoccupied if those terms are given a reasonably fair and liberal meaning. Wood on Fire Ins., Sec. 91.

As to the second point, whether there was a waiver, it is not material to inquire if the foregoing view is correct. But conceding it is not, then whether there was a waiver or whether the company, by its knowledge, through its agent, of the situation, is estopped to make the defense, is a mere question of fact which is settled by the verdict, and we think, after fully considering the testimony, there is no occasion to

interfere with the conclusion of the jury in this respect. The loss was in no way caused by the alleged vacancy, and therefore the defense is purely technical, though none the less valid if supported by the evidence.

The jury chose to believe the testimony of the plaintiff that he notified the agent of the condition of the property, and that the agent made the reply as stated.

Though there is serious conflict as to this point, it may be said that the version given by the plaintiff is by no means unreasonable. Indeed it is quite in accord with common experience, and we can not say the jury should have disbelieved it.

It is insisted that the court erred in giving the third instruction asked by plaintiff. The ground of objection stated in the brief is that it was calculated to mislead the jury, and to induce them to suppose that Brown, the agent, had power to waive a forfeiture. Without stopping to discuss the point whether the agent had power to do so or not, we think such is not the purport of the instruction. It merely advised the jury that upon a certain state of facts, to wit, notice to the agent of the condition of the property and his assurance that it was "all right and we will take care of it," and reliance by plaintiffs upon such assurance, then the company could not insist upon a forfeiture by reason of such facts. In other words, after the company had by its agent received the notice, and by him had given the assurance referred to, it can not permit the policy to remain uncanceled, and then when a fire occurs set up the right to forfeit because the building was vacant or unoccupied. We think there is no substantial ground of complaint in reference to this instruction.

It is also urged that the fifth instruction for the appellee was erroneous, the objection stated in the brief being that it left the jury to determine, as matter of law, what constituted an occupation consistent with the uses for which it was insured.

Turning to the instructions given at the instance of appellant we find the court very fully advised the jury as to what occupation would be consistent, etc.

Bevan v. Atlanta National Bank.

Indeed, we think the appellant received from the court a more favorable statement in this respect than it could strictly have required.

It is not necessary that in every instruction there should be a full and complete statement of the principles and rules of law involved. Such a course would render the practice of giving instructions more imperfect than it now necessarily is under our system. Conceding that this instruction leaves something for the jury to supply in the way of a definition, the want is very amply met in several of those given at request of appellant.

But we do not see that there is really any fault. The occupation must be consistent with the purposes for which the building was designed and insured, and so the court told the jury. It could hardly have said more without invading the province of the jury to determine whether under the facts there was such occupation. Nor do we think the language of the instruction would mislead the jury as to what was the issue referred to therein, or that it erred in calling special attention to certain facts therein set forth, as suggested by counsel.

No other points are made in the brief and upon consideration of the whole case we are of opinion that substantial justice has been done by the judgment. It will be affirmed.

Judgment affirmed.

JOHN L. BEVAN, ADMINISTRATOR,

V.

THE ATLANTA NATIONAL BANK.

Negotiable Instruments—Note—Signature—Forgery—Evidence—Witnesses.

1. Where a witness has testified in the usual way to the genuineness of a disputed signature, it is not proper, upon cross-examination, to submit to him others known to be genuine for comparison with it, and a statement to the jury of the difference between them as they may appear to him.

2. The authorship of a writing may be shown by other circumstances than the likeness or unlikeness of a given handwriting to that of the alleged writer, such as a marked peculiarity in its spelling or style of composition characteristic of the alleged writer.

3. In an action brought to recover upon a promissory note, the defense being that the name of one of the alleged signers thereof, a person deceased, was a forgery, this court holds as proper the exclusion of several questions sought to be asked certain witnesses upon cross-examination, touching the difference between signatures submitted, and others, as to the ownership by them of similar notes, and declines to interfere with the judgment for the plaintiff.

[Opinion filed June 12, 1891.]

IN ERROR to the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. BEACH & HODNETT, for plaintiff in error.

First: The notes and order signed by Mrs. Williams upon which the witnesses based their knowledge of her signature and which showed a peculiarity in spelling, were admissible. *Brooks v. Tichbourne*, 5 Exchequer, 590; 16 Central L. J. 102.

Second: The admission in evidence of the conversation between the witness Foley and Mrs. Williams, was error. 2 *Smith's Leading Cases*, 1011; *Thompson v. Drake*, 32 Ala. 99.

Third: The court erred in restricting the cross-examination of the witnesses. *Ray v. Bell*, 24 Ill. 441; *Faulk v. Kellums*, 54 Ill. 188; *Melvin et al. v. Hodges*, 71 Ill. 422; *Gitchell v. Ryan*, 24 Ill. App. 372; *First Greenleaf on Evidence*, Sec. 446; *Thompson on Trials*, Vol. 1, Sec. 406 and 450; *People v. Benson*, 52 Cal. 380.

Fourth: To entitle the plaintiff to recover, the plaintiff's case must be proven by a preponderance of the evidence. Failing to do so a verdict in favor of the plaintiff will be set aside. *Lincoln v. Stowell*, 62 Ill. 84; *Peaslee v. Glass*, 61 Ill. 94; *Boudreau v. Boudreau*, 45 Ill. 480.

Messrs. F. L. CAPPS and BLINN & HOBLIT, for defendant in error.

The law of this State is that the genuineness of a signature can not be proved or disproved on the trial of a cause by comparing it with another signature not in the case, whether

Bevan v. Atlanta National Bank.

the signature sought to be compared with it is admitted to be genuine or not. *Gitchell v. Ryan*, 24 Ill. App. 375; *Kernin v. Hill*, 37 Ill. 209; *Melvin v. Hodges*, 71 Ill. 425; *Massey v. Farmer's National Bank*, 104 Ill. 333; *Snow v. Wiggin*, 19 Ill. App. 543.

The cross-examination of a witness must be confined to the issue on trial, and all evidence calculated to mislead the jury from the real issue should be excluded. *Holloway v. Johnson*, 23 Ill. App. 332; *Hanchett v. Kimbark*, 118 Ill. 128; 1 Greenleaf on Ev., Sec. 51-52; 1 Wharton on Ev., Sec. 29; 1 Best on Ev., Sec. 251; 1 Phillips on Ev., Sec. 748; *Evans v. George*, 80 Ill. 51.

PLEASANTS, J. This was an action of assumpsit against plaintiff in error upon a promissory note for \$1,000, purporting to be signed by C. E. Pratt and Alice Williams, to which he pleaded the general issue sworn to. Verdict and judgment for plaintiff below for \$1,087.90, motion for a new trial having been denied and exception thereto duly taken. The defense was that the name of decedent signed to the note was forged. Upon that question there was a conflict in the evidence which makes the finding conclusive. No complaint is made in respect to the instructions. Plaintiff in error relies for a reversal of the judgment upon the exclusion of evidence offered by him.

Several witnesses who testified to their knowledge of her handwriting and signature from seeing her sign other papers, and to their belief that the signature in question was genuine, had their attention called on cross-examination to certain notes, and were asked if they were not the papers from which their knowledge of her handwriting was derived; whether her name as signed to them was not spelled and written as Alliee (double e); whether the signature was or was not like that on the note in suit, and to state the difference, if any. To each of these questions objection was made and sustained.

The tendency of the proposed cross-examination was to rebut the evidence in chief—which was the usual and proper kind of proof of handwriting, namely, the opinion of witnesses acquainted with the party's hand through other specimens—

by a comparison of the signature in question with others known to be genuine. It is true that the comparison was to be made in the first instance by the witness, and the difference between the writings compared, as they appeared to him, was then to be stated by him to the jury, but the result or effect was the same in kind as of a direct submission of the papers to the jury for their inspection and comparison. And that such was the object and purpose of the proposed cross-examination, we think, appears on its face, and by the offer of the papers themselves, which was made by the counsel and refused by the court.

It is said that the propriety of the excluded questions is shown by the case of *Melvin v. Hodges*, 71 Ill. 422. That was a suit upon a note, in which the defendant denied the genuineness of the signature. He called a witness who testified in chief that he was well acquainted with Melvin, had gone to school with him in Tennessee, had seen him write often, was well acquainted with his writing when young, was absent from him for eighteen years, had known him and seen him write during the last four years, and would not take the signature to the note to be his handwriting. The court then permitted him, at the instance of plaintiff, to examine Melvin's signature to the plea, which was admitted to be genuine, "as a basis for testing the accuracy of his observation and memory." For that purpose the Supreme Court say it was proper; that it was "not to prove a signature by comparison, but to test the accuracy of the witness' memory;" and that "the only effect the examination could have would be to enable the witness to determine how accurate and reliable was the impression of Melvin's signature, as fixed in his memory, with the views of confirming or modifying his previously expressed opinion in regard to the signature in controversy."

There the witness had been familiar with the party's writing many years before, but his recent opportunities had been slight. His opinion was founded mainly on his memory of those he had when they were boys together, and he did not state it as very positive or clear. He was permitted to look

at a recent signature, presumably near enough in date to that of the one in question to be marked by the same characteristics, and then say whether he would adhere to or modify the opinion he had previously expressed and which was based on recollection of what he knew in his boyhood about the party's handwriting—a thing that undergoes more or less of change with the lapse of time. Certainly this was not a comparison, even in the mind of the witness, between the signature in question and another to prove or disprove the genuineness of the former; but a comparison of the latter with still other writings of the same party as he remembered them after many years, for the sole purpose of having him determine how far he could rely on that remembrance as the ground of an opinion upon the genuineness of any recent writing said to be Melvin's but disputed. He was not asked to give the jury any means or data for any comparison by them of the writing in question with any other. The sole object and effect was to test the reliability of the opinion he had stated, and to modify or confirm it as the test should require.

In the case at bar the object and effect of the questions excluded was, so far as related to the witnesses, to compel a retraction of their opinion that the disputed signature was genuine by a comparison of *it* with others that were known to be genuine; but claimed to be unlike it, and as related to the jury, to give them information of the differences, if any, and thus force a comparison by them. We therefore think the authority cited is not in point.

But it was further claimed that the deceased habitually spelled her given name differently from the way it was spelled on the note in suit, and that to prove it the other notes referred to were admissible; citing *Brooks v. Tichborne* 5 Exchequer, 590; 16 Cent. Law Jour. 112; *Pate v. The People*, 3 Gilm. 644, 659. In the first, which was an action on the case for libel, in charging the plaintiff with libel the writing in question contained the defendant's name, written "Titchborne;" and to prove the plaintiff wrote it, several letters which were written by him and showed the same misspelling

of defendant's name were offered in evidence, but excluded; for which ruling a new trial was awarded. It was held that the habit of so misspelling the name was some evidence of the authorship of the disputed writing—its value depending on the degree of peculiarity of the misspelling and the number of occasions on which the party so misspelled it; that the habit might be shown by proof of oral misspelling as well, but where it was written, the writing was proper evidence of it.

It is not doubted that the authorship of a writing may be shown by other circumstances than the likeness or unlikeness of the handwriting to that of the alleged writer, as, a marked peculiarity in its spelling or style of composition characteristic of the alleged writer. Such a fact is as independent of its likeness or unlikeness to his handwriting as would be his admission of its authorship, though not so convincing; and proof of such fact may be made in any way that would be appropriate in other cases. *Pate v. The People*, which was an indictment for forgery, furnishes a good illustration. One of the papers the defendant was charged with forging was a receipt as follows:

“May 13th, 1844: I Hav Ths day Received of Alonzo Pate, fourteen Hundred dollars Being paid on a Track of land as witness my Hand and Seal,” etc. Another was a contract for the conveyance of land, which was in the same general style. Suppose a dozen witnesses had testified that they were well acquainted with the defendant's handwriting, from sufficient means of knowledge, and believed those papers to be in it, could there be any question of his right, without denying their likeness to his writing, to introduce for the purpose of disproving his authorship of them, a hundred receipts and contracts written by him before and after May 13, 1844, in the usual course of his business as a conveyancer, and showing a perfectly correct spelling and correct use of words, capital letters and punctuation marks? And as the marked unlikeness in these respects would tend to disprove it, so a marked likeness in peculiarities of spelling, using capitals and punctuation marks would tend to prove it, independently of

Bevan v. Atlanta National Bank.

their likeness or unlikeness in others. The two cases cited may be authorities to that extent, but no further on this subject.

We think this was no such case. Here was no such characteristic habit or such marked peculiarity as would throw any light upon the question. The claim is that she habitually wrote her given name as "Alliee" (double e). The evidence, so far as received, is that sometimes she did and at others did not. Her name, as she pronounced it, was "Alice." She habitually misspelled it by using two letters "l." The note in suit was signed according to her habit in that particular. It was also phonetically right, and we can not believe she ever intended to write the last syllable without a sibillant letter to represent the sound she distinctly gave it; and, therefore, we infer that where the first of the last two letters had the appearance of an "e," it was by her intended for the letter "c," and so was not a case of misspelling, but simply of peculiarity in her formation of that letter in that connection. It hardly amounted to a peculiarity. That letter, in almost everybody's writing, is quite commonly so formed that but for the connection it would be taken for an "e." (The writer hereof notices it in each of the words "evidence," "received," "pronounced," "appearance" and "notices"—being all of those on the page he is writing in which it immediately precedes the letter "e".) It is doubtless largely accidental, depending on the pen, ink or paper used, or other accidental condition, rather than the habit or purpose of the writer. But if it were such a peculiarity, that is, of the kind that is the subject of the comparison, which our law disallows, and is not an independent fact like a peculiar habit of spelling or phrasing, we think the ruling was proper.

Plaintiff's witnesses were asked, on cross-examination, whether they held any note purporting to be signed by Mrs. Williams and C. E. Pratt, in respect to which the genuineness of the signature of her name was disputed, or were interested in any bank that held such a note. One of them at least answered that he did hold such a note, while in the case of

others the questions were objected to, and the objection sustained.

It is not pretended that the holding of such a note or interest would have disqualified them. Their interest was not in the event of this suit, nor could the record be used in evidence for them or the bank in a suit upon such a note, but was at most in the question alone. Nor is it clear that it would have shown an interest in the question. Pratt was a son-in-law of Mrs. Williams, and lived on a farm adjoining hers. Their relations were very intimate. The notes referred to were separate and independent transactions. The holder of one might be in no way concerned about the question of the signature of her name to any other. The evidence of it, as to his, might be entirely different from that relied on as to them. As bearing upon the bias of the witness, if it had any, the evidence excluded was so uncertain and remote, and would have so tended to introduce collateral issues and improper prejudices one way or the other, that we think the court may be justified in keeping it out of the case.

The statement of her nephew, Judge Foley, of what she said about the likelihood of her losing anything by Pratt, while it did not touch the particular transaction here involved, in its connection tended to show the personal and business relations between her and him, which was proper, and could hardly have had any further effect upon the minds of the jurors.

Counsel make no point, in their brief or argument, upon the judgment as to costs, and therefore we have not noticed it. Perceiving no material error in the record the judgment will be affirmed.

Judgment affirmed.

Hewitt v. Hexter & Co.

ROBERT G. HEWITT
v.
S. HEXTER & Co.

Negotiable Instruments—Note—Payment—Limitations.

In an action brought to recover a balance claimed to be due upon a promissory note, the defense being payment, and the Statute of Limitations, the judgment being for the plaintiffs, this court holds, in view of affidavits filed by the defendant, that a new trial should have been granted upon the ground of newly discovered evidence.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Menard County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Mr. T. W. McNEELY, for appellant.

Mr. CHARLES NUSBAUM, for appellees.

CONGER, P. J. On the 3d day of December, 1876, Robert G. Hewitt gave his note for \$100 to his nephew, Louis C. Hewitt, and this suit is for recovery of the balance claimed to be due on this note, it having been assigned to appellees. The defenses were payment and the Statute of Limitations. There were two credits upon the back of the note which read as follows: "Feb'y 1, 1879, credit on the within note \$9." "July 28, 1880, a credit of \$3 on the within note."

The first credit of \$9 was claimed to be for a quarter of beef, and the one of \$3 was claimed to be for one day's work of one George Dorand, who it was claimed by Louis C. Hewitt was in the employ of appellant, and with the team of appellant worked for said Louis C. Hewitt, for which he gave appellant the credit of the \$3.

Appellant denied both these credits, claiming that the first was a present, or rather intended as compensation to said Louis C. Hewitt for pasturing stock of appellant, while as to the last he denied that Dorand ever worked for him at all.

The evidence is not very satisfactory as to these credits, but we should not interfere with the judgment for that reason. And we think the court, under the weak and unsatisfactory character of the evidence, should have granted a new trial upon the ground of newly discovered evidence.

On appellant's motion for a new trial he filed the following affidavits :

" STATE OF ILLINOIS, }
Menard County. } ss.

"Robert G. Hewitt being first duly sworn, deposeth and says, that upon the trial of the case of S. Hexter & Co. v. This Affiant, Louis Hewitt, testified that about July, 1880, he placed a credit of \$3 upon the note in question in such suit at the request of this affiant, and that such credit was for work and labor of George Dorand, and a team, then done for said Louis Hewitt at his request by said Dorand, and that Dorand was then in the employ of affiant, and that Dorand then had in such team the horses of affiant. That affiant before such trial made due and diligent inquiries as to what the credit of \$3 was for, and was unable to find out or know the same until Louis Hewitt swore the same on said trial. That such testimony was a surprise to affiant; that affiant did not pay said \$3 to Louis Hewitt at any time, and did not furnish the labor of said Dorand as stated by Louis Hewitt; that affiant, after said trial on the 21st inst., went to the residence of said George Dorand, in Cass County, Illinois, and that said Dorand informs affiant that he never worked for said Louis Hewitt with or without a team at the request of affiant, or in 1880, or at any other time, and that said Dorand informs affiant that he will so testify, and affiant so believes. And affiant makes the affidavit of said Dorand part hereof. That affiant knew of no person by whom he could prove such facts at the time of the trial, before or since, except said witness, Dorand, and did not know what he could prove by said Dorand until after the trial. That said Dorand was during the day of said trial more than ten miles from the court house in Petersburg, Illinois, where such trial took place, and that if a new trial is granted, this affiant believes he can

Hewitt v. Hexter & Co.

have such witness, Dorand, present at a trial of this case at the next term of this court, and that by his testimony he can justly prevent any verdict herein being found against him. That the affiant is not indebted to plaintiffs.

“R. G. HEWITT.”

“Subscribed and sworn to October 22, 1890.

“THEO. C. BENNET, Clerk.

“STATE OF ILLINOIS, }
“Cass County, } ss.

“George Dorand being first duly sworn, on oath deposeth and says: I never, at any time, worked for R. G. Hewitt a day in my life at any kind of employment.

“GEO. G. DORAND.

“Subscribed and sworn to before me this 22d day of October, 1890.

“I. H. STANLEY, J. P.”

Said affiant being further sworn on oath, says: I never worked a day for Louis C. Hewitt on account of R. G. Hewitt at any time, but did work for said L. C. Hewitt on account of Abijah S. Nottingham.

“GEORGE DORAND.

“Subscribed and sworn to before me this 22d day of October, 1890.

“I. H. STANLEY, J. P.”

Without commenting on authorities cited in the briefs, or attempting to lay down any general rule, we feel satisfied that under all the circumstances of this case, justice required that a new trial should have been granted.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

39	588
45	379
46	59

GEORGE NORTHRUP
V.
WILLIAM J. SMOTHERS.

Jurisdiction—Justice—Injury to Stock—Sec. 13, Chap. 79, R. S.—Practice—Evidence.

1. Bad grammar or composition will not vitiate a writing where the meaning is clear.

2. A justice may try an action for injury to stock, in any form appropriate to the injury done.

3. Upon appeal from the finding of a jury in a case tried before a justice, he failing to enter a formal judgment therein, the successful party may for such reason require a dismissal of the appeal, but a motion to dismiss the suit amounts to admitting jurisdiction as having been obtained by the appeal; and where the case is of such a kind that the court below had original jurisdiction, and to which such party could submit his person without process, he should not, having done so, be allowed to question the jurisdiction thereof.

4. In an action brought to recover for injury to certain hogs, this court holds that the plaintiff excepted at the proper time to a certain ruling of the trial court, and that in view of the evidence, the judgment for the defendant can not stand.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Scott County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. JAMES CALLANS and MORRISON & WHITLOCK, for appellant.

Mr. JAMES M. RIGGS, for appellee.

PLEASANTS, J. Appellant brought this suit before a justice, and being defeated by the finding of the jury, appealed to the Circuit Court. No formal judgment was entered by the justice. In the Circuit Court a motion was made by the defendant to dismiss the suit, but on what ground does not appear. The motion was denied and the case continued. At the next term, after the jury was impaneled, the defendant

asked that plaintiff be required to state his case and be confined thereto in his evidence. Plaintiff's counsel then stated it to be that defendant turned out his hogs, knowing that they were infected with cholera, and with intent to communicate the disease to those of his neighbors, particularly those of the plaintiff; that he was requested to put them up but refused, and that they did infect plaintiff's hogs, of which a number by reason thereof had died. Thereupon the defendant moved the court to dismiss the suit, on the ground that a justice has no jurisdiction of the subject-matter of the case as stated; which motion was sustained and judgment accordingly entered. This is an appeal from that judgment.

It is contended on behalf of appellee that the only remedy for the wrong stated, is an action on the case; that if the justice had no jurisdiction of such an action the Circuit Court could have none on appeal, and that the justice had none; citing *W. U. Telegraph Co. v. Dubois*, 128 Ill. 254-5.

The statute confers jurisdiction on justices of the peace "in actions for damages for injury to real property, or for taking, detaining or injuring personal property" (Sec. 13, Chap. 79, R. S.), but not in actions on the case generally. Therefore while they may not lawfully try an action for slander, they may for injuring hogs, in any form appropriate to the injury done. In the case cited the telegraph company was sued before a justice of the peace for negligence in respect to a dispatch sent to plaintiff, whereby he was misled as to the price at which the sender would deliver to him a car load of apples, and judgment was rendered against it by the Circuit Court on appeal. The Supreme Court held that it was under no contract obligation to the receiver of the dispatch; that his only remedy was by an action on the case, and that "under our statutes justices of the peace have no jurisdiction of an action on the case for such an injury as is here involved." The action there was not for taking, detaining or injuring personal property. If it had been, we apprehend that the form of action—in case—which was appropriate, would not have been held a bar to the jurisdiction. The opinion of this court has been fully stated in *C. & A. R. R. Co. v.*

Calkins, 17 Ill. App. 55; Skinner v. Morgan, 21 Ill. App. 209; Workman v. Neal, 21 Ill. App. 293. We yet see no reason for changing it.

It is also suggested that the Circuit Court had no jurisdiction, because the justice had rendered no judgment. That might have required the dismissal of the appeal had appellee asked it. His motions, however, were to dismiss the suit, thereby admitting the jurisdiction as having been obtained by the appeal; and after the first was denied he voluntarily went to trial. The case was of a kind of which the Circuit Court had original jurisdiction, and to which he could submit his person also, without process, if he chose so to do, and having done it he ought not to be now heard on this point. Randolph County v. Ralls, 18 Ill. 29; Birks v. Houston, 63 Ill. 77; Allen v. Belcher, 3 Gilm. 594.

Again, it is said, the record does not affirmatively show that appellant excepted, at the proper time, to the ruling of which he now complains. It appears that this ruling was made and the case disposed of on May 7, 1890; that the bill of exceptions is not dated but was filed on the 8th, and that it states the act of excepting in the present tense: "to which ruling of the court to dismiss said suit the said plaintiff *excepts*."

To be available, the exception should be taken at the time of the ruling and the bill should affirmatively show it. This is usually shown by the statement that the party by his counsel "then and there excepted." It is claimed that in the absence of a date to the bill, the expression used in this case must be taken to refer to the time when it was filed, which was the next day after the cause was disposed of; and in support of this proposition counsel cite Gibbons v. Johnson, 3 Scam. 61, 63. In that case the court said: "The record does not show that the plaintiff excepted to the decision of the court at the time the instructions were given, or at any time during the progress of the trial. On the contrary, the bill of exceptions was filed two days after the trial and judgment, and in the conclusion of it it is stated, that 'to all of which opinions of the court, the plaintiff *excepts*,' etc., evidently showing that the plaintiff then, for the first time, excepted."

That was a vigorously contested case upon a lost note, the execution of which was denied. An appeal was taken from the Probate Court, the venue was changed and "much testimony was introduced on the part of the plaintiff," which the court instructed the jury was not sufficient to entitle him to judgment. From these facts it may well be presumed that the trial occupied more than one day, and that in the course of it many more than one ruling was made against the plaintiff. Yet the bill of exceptions shows nothing about exceptions more than appears in its conclusion as quoted, which states an exception to all, in a lump, as at one time and in the present tense. Since a bill of exceptions is regarded as a pleading and taken most strongly against the party presenting it, the construction given it by the court may have been in reason, as it must be accepted in law by us, the proper one. But in our view the circumstances and the statement of the bill in the case here were materially different. The trial occupied less than a day, only one ruling was made against appellant, and therefore only one exception could have been taken; time was given in which to file the bill; it must have been asked before the bill was filed; the asking was in effect notice that the exception was taken; the bill was prepared, presented and signed before it was filed, and it was filed on the next day after the ruling excepted to was made. These circumstances constitute cogent proof that the exception was in fact taken at the time of the ruling, and the use of the verb in the present tense would indicate that the counsel who prepared it intended and expected to have it filed on that day, in which case the tense used would have been proper.

This intention and meaning of the word so used is made more manifest and sufficiently certain by the use of another verb in the same tense to denote the action of defendant's counsel, which must have been taken the day before the bill was filed, namely, his motion to have the suit dismissed. The language of the bill is: "Upon this statement of the case the defendant *moves* to dismiss the case, because," etc., and after stating the motion was granted, and that the court thereupon dismissed said suit, adds as above quoted: "To which

ruling of the court to dismiss said suit, the said plaintiff *excepts* and *prays* an appeal to the Appellate Court, * * * which appeal is allowed on condition of said plaintiff entering into bond * * * and filing his bill of exceptions in thirty days." This statement of defendant's action as present, of that of the court following as past, and of that of plaintiff still following as present, may be faulty syntax, but bad grammar or composition will not vitiate a writing where the meaning is clear notwithstanding such faults. We think the bill, fairly construed, states the exception as taken at the proper time.

Counsel treats the opening statement of plaintiff's case as a declaration, strictly subject to the technical rules applicable to the written pleading, and points out some defects therein as such. We do not so view it, nor if we did, is any defect suggested which would justify the judgment entered.

For the error committed in dismissing the suit the judgment will be reversed and the cause remanded.

Reversed and remanded.

THE VILLAGE OF WAPELLA

V.

VESSELIUS DAVIS.

Municipal Corporations—Ordinances—Publication of—Proper Authority—Evidence.

1. If, upon inspecting a printed book or pamphlet of ordinances, it can be determined from any part of it that it purports to be published by proper authority, it is enough.

2. The fact that such ordinances, certified in accordance with Sec. 4 of Art. 5 of the "Cities and Villages Act," are printed copies of the originals instead of written, can make no difference as to their admissibility in evidence in a given case.

3. Upon a suit brought by a municipality to recover from defendant a penalty for failure to perform road labor on its streets, in conformity with the requirements of one of its ordinances, this court holds as erroneous the exclusion of the book of ordinances thereof offered in evidence by the plaintiff, and that the judgment for the defendant can not stand.

Village of Wapella v. Davis.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of De Witt County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. LEMON & MONSON, for appellant.

Messrs. MOORE & WARNER, for appellee.

CONGER, P. J. This was a suit brought by the village against appellee to recover a penalty for failure to perform road labor on the streets.

On the trial, appellant offered in evidence a printed pamphlet, purporting to contain the ordinances of the village. The title page of the pamphlet reads: "Revised Ordinances of the Village of Wapella, DeWitt County, Illinois, 1885." Section thirty-seven of said ordinance was as follows:

"Sec. 37. This ordinance shall be printed and published in book or pamphlet form, and at the foot of each shall appear the clerk's printed or written memorandum of the date of the passage and of the publication of such ordinance, and the same shall be known as the record book of ordinances of the village of Wapella. Said board may have an indefinite number of said books printed or written, and each and every one thereof shall be taken and considered originals."

The memorandum, signatures and certificate at the foot of said ordinance, is as follows: "Passed March 10, A. D. 1885, approved March 12, 1885. J. M. Greene, President *pro tem*. Attest: John E. Karr, village clerk. (Village seal.)

"I, John E. Karr, village clerk of the village of Wapella, Illinois, do hereby certify that the foregoing is a true and correct copy of the original ordinance that is on file in my office, and the same was published in pamphlet form, and fifty-two copies returned to my office this 9th day of April, A. D. 1885. Attest: John E. Karr, village clerk. (Village seal.)"

Upon the objection of appellee the trial court refused to permit the book of ordinances to be read as evidence.

This we think was error. Counsel for appellee in their

brief say: "Had there been printed on the title page of said pamphlet, "Published by authority of the Board of Trustees of the Village of Wapella," then it would have been admissible under the statute, and it would have proven the passage and publication of the ordinance."

By Sec. 4 of Art. 5 of the Cities and Villages Act, it is provided that "All ordinances may be proven by the certificate of the clerk, under the seal of the corporation. And when printed in book or pamphlet form, and purporting to be published by authority of the board of trustees, * * * such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, etc.

To "purport" according to Webster means "To intend to show; to intend; to mean; to signify."

We are at a loss to perceive how the book of ordinances with Sec. 37 above quoted, certified to by the village clerk, with the corporate seal attached, does not as fully show that such book or pamphlet was intended by the village board to be published by their authority, as if the title page itself had purported to show it.

If, upon inspecting a printed book or pamphlet of ordinances, it can be determined from any part of it that it purports to be published by the proper authority, that is enough.

Again, it was admissible under the first provision of Sec. 4, *supra*. All of the ordinances contained in the pamphlet were in the very language of the law, "proven by the certificate of the clerk under the seal of the corporation."

The fact that such ordinances so certified by the clerk were printed copies of the original instead of written, could make no difference.

It is also objected that the ordinance, under which suit was brought, was void because not in conformity with the statute.

This ordinance provides that "every male inhabitant of said village over the age of twenty-one years, and under the age of fifty years, shall be required to labor two days each on the streets and alleys of said village each year (except idiots, lunatics and those physically unable to perform such labor, and such others as are exempt by law)," and that the street com-

Wooley v. Yarnell.

missioner "may also require them to furnish a tool or implement with which to perform such labor;" and that on failure to comply with the notice of the street commissioner therein specified, the guilty party shall be liable to the penalty, to recover which this suit was brought. The statute gives the village board power to require "every able-bodied male inhabitant," to labor on the streets.

We think a reasonable construction of the language of the ordinance makes it substantially the same as the statute.

As to whether the provision of the ordinance requiring the bringing of tools is within the power of the board to pass, is not a question in the case, and need not be noticed.

We think the ordinance should have been admitted in evidence, and for the error in sustaining the objection to its introduction the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

JAMES S. WOOLEY

v.

WILLIAM R. YARNELL.

39 595
53 239

Mortgages—Foreclosure—Limitations—Sec. 20, Chap. 83, R. S.—Removal of Mortgagor to Another State.

The fact that a mortgagor of property located in this State, removed to and has resided in another State for such a length of time as will defeat an action at law upon the note given by him, will not affect the right to proceed in chancery to foreclose.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Christian County; the Hon. JACOB FOUKE, Judge, presiding.

Messrs. J. C. ESSICK and J. C. McBRIDE, for appellant.

Messrs. GROSS & BROADWELL and J. H. YARNELL, for appellee.

CONGER, P. J. This is a bill in chancery to foreclose a mortgage. The principal facts are, on January 1, 1869, appellant, James S. Wooley, lived at Pana, Illinois, where he owned a farm. On that day he borrowed from John F. Spaulding, who resided in Boston, Massachusetts, \$1,500, and executed and delivered to Spaulding the following note:

“\$1,500.

PANA, ILLINOIS, January 1, 1869.

“Five years after date, I promise to pay John P. Spaulding, or order, fifteen hundred dollars, for value received, with eight per cent interest, payable annually, and payable in the city of Boston, Mass., and secured by a real estate mortgage, lawfully stamped.

“J. S. WOOLEY.”

On the back of which appeared the following:

“Interest paid to date, January 1, 1870. Without recourse.

“JOHN P. SPAULDING,

“E. W. YARNELL.”

Wooley and his wife on the same day of the date of the note executed a mortgage on their farm, to secure said note, which was duly acknowledged and recorded.

About 1877 Mrs. Wooley died, and in August, 1881, Wooley removed to and took up his residence in the State of New Hampshire, where he still resides.

In 1889 Spaulding made a present of the note to Mrs. Electa W. Yarnell, a daughter of Wooley, and she sold and delivered it to appellee, William R. Yarnell, who files the bill in the present case.

The Statute of Limitation of Illinois of ten years was set up, but as we do not think that section applies, and as it is not insisted upon by appellant in his brief, we shall not stop to notice it.

Appellant in his brief says: This case involves but one legal question. It is a question arising under our Statute of Limitations. Sec. 20, Chap. 83, R. S., provides:

“When a cause of action has arisen in a State or Territory out of this State, or in a foreign country, and by the laws thereof an action thereon can not be maintained by reason of the lapse of time, an action thereon shall not be maintained in

Wooley v. Yarnell.

this State." Under this section of our statute appellant pleaded as a defense his residence in the State of New Hampshire for more than six years before the commencement of this action; and the Statute of Limitation of New Hampshire, which provides that "actions of trespass to the person, and actions for defamatory words may be brought in two years, and all other personal actions within six years, after the cause of action accrues, and not afterward."

It is insisted by appellant that when Wooley removed to the State of New Hampshire in 1881, and became a resident of that State, a cause of action arose in the State of New Hampshire against him upon the note, and that after the lapse of six years such cause of action would be barred in New Hampshire, and by virtue of Sec. 20, Chap. 83, of the Illinois Statute, no action could be maintained in this State upon the note, and cites *Hyman v. Bayne*, 83 Ill. 256, and *Hyman v. McVeigh* (unreported), 10 Legal News, 157, in support of this view.

In the latter case the Supreme Court say: "The words, 'when a cause of action has arisen,' as they occur in the statute pleaded, should be construed as meaning, when jurisdiction exists in the courts of a State to adjudicate between the parties upon the particular cause of action, if properly invoked—or in other words, when the plaintiff has the right to sue the defendant in the courts of the State upon the particular cause of action, without regard to the place where the cause of action had its origin. This was the view taken in *Hyman v. Bayne*, *supra*, although not discussed at length in the opinion, and we do not conceive that the question need be discussed now." The doctrine as contended for by appellant would seem to be supported by the foregoing language so far as an action on the note alone is concerned.

But we are inclined to think that the decree of foreclosure rendered by the court below may be sustained notwithstanding the above language should be admitted to be sound law.

The present case is not an action on the note, but a proceeding in chancery to foreclose the mortgage. A proceeding *in rem*, of which the courts of New Hampshire never did have

jurisdiction, and for that reason, we think, is not included in the provisions of Sec. 20 of our Limitation Act.

We are aware of the doctrine repeatedly announced by the courts of this State, that a mortgage is but an incident to the debt, and when the debt is barred, the mortgage is also barred and can not be foreclosed. That this is the general doctrine will not be disputed by any one. It rests upon the principle that a note and mortgage may be enforced separately or together, and when those rights have both existed during the life of the note, there is no hardship in holding that the mortgage dies with the note. But in the present case, if the doctrine of *Hyman v. McVeigh* is to govern, the courts of New Hampshire may have had jurisdiction to collect the note, but did not have to foreclose the mortgage, and therefore in equity and good conscience it ought to remain a valid claim against the mortgagor, enforceable by our law, even though the note could not be collected by an action at law. While compelled to recognize the rule laid down in *Hyman v. McVeigh*, we are not disposed to extend it beyond the facts of that case.

We do not believe it to be sound law, that one holding a mortgage security for his debt, which is ample, and upon which he is willing to rely, without reference to the personal responsibility of his debtor, and who proceeds, according to the laws of this State, to enforce his claim against the mortgaged property, can be defeated because the mortgagor may have resided in another State for such length of time as would defeat an action at law upon the note.

Believing that the decree of the Circuit Court in foreclosing the mortgage was right, it will be affirmed.

Decree affirmed.

Wabash R. R. Co. v. Speer.

THE WABASH RAILROAD COMPANY

V.

MARY E. SPEER.

39 599
156 244

Railroads—Negligence of—Unnecessary Sounding of Whistle—Crossings—Personal Injuries—Contributory Negligence.

1. It is ordinarily negligence to go upon a railroad track without using the senses to ascertain as to the proximity of trains.

2. A railroad company is liable for personal injuries arising from the frightening of a team standing a safe distance from a crossing, through the unnecessary sounding of the whistle of one of its engines.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Ford County; the Hon. ALFRED SAMPLE, Judge, presiding.

Mr. GEORGE B. BURNETT, for appellant.

Messrs. COOK & MOFFETT and T. H. TIPTON, for appellee.

WALL, J. The point mainly urged by the appellant, is that appellee did not use ordinary care to discover the approach of the train. If this is a defense it must be because one desiring to cross a railroad track should not approach within a certain distance of it while a train is in sight.

It is negligence usually to *go upon* a track without using the senses to ascertain whether a train is coming, but we know of no rule of law or prudence forbidding one to go along the highway toward a railroad track without such care. If before going *on* the track he takes the precaution to know whether he can cross in safety, he has done all that is required.

In this case the injury was occasioned, as appellee alleged, by the unnecessary sounding of the whistle just as the train reached the crossing, and while the team of appellee was standing a safe distance from the track waiting for the train to pass.

The team was frightened by the whistle, and turning suddenly, upset the wagon throwing appellee violently to the ground.

Appellant urges that it was negligence for appellee to be there at that time, and that an instruction given at the instance of appellee which assumed the contrary or ignored the importance of due care to observe the approach of the train in coming to that point was erroneous. We do not so regard it.

The appellee had a right to drive up to the point where she stopped even though she knew the train was coming. She had a right to expect, when she did so, that no unnecessary sounding of the whistle would occur, and she may well complain if she was disappointed in that respect.

The view suggested by appellant would require persons to stop at a greater distance from the track than would be necessary if the train men are bound to act with proper care and discretion in the use of the whistle. The judgment will be affirmed.

Judgment affirmed.

ELIZA A. SHEETS ET AL.

V.

GRANVILLE L. WETSEL, EXECUTOR ET AL.

Wills—Construction of.

1. The intention of a testator, if not inconsistent with the rules of law, must govern in the construction of a given will.

2. It is the general rule that when the use of money is given to one for life, with remainder over to another, the former has no right to the possession of the money so bequeathed, but it should be put at interest, the interest paid to the tenant for life, and the principal retained for the remainderman.

3. In the case presented, this court construes several clauses of the will involved, affirming in part and reversing in part the decree of the trial court therein, with directions to amend the same.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of McDonough County; the Hon. C. J. SCOFIELD, Judge, presiding.

Messrs. NEECE & SON, for appellants.

Messrs. D. G. TUNNICLIFF, for appellees.

CONGER, P. J. .This is an *ex parte* proceeding in chancery to obtain a construction of certain clauses in the last will and testament of George W. Sheets, deceased. Eliza A. Sheets, widow of the said George W. Sheets, Granville L. Wetsel, executor of the will, and Ira Sheets, son of the testator and a legatee under the will by his guardian, Eliza A. Sheets, are parties.

The clauses in the will under which the controversy arises, are the third, fifth and eighth; the executor claiming that the money bequeathed to Ira Sheets by the third clause should not be paid to his guardian, but held by the executor or paid to a trustee and the income paid to the guardian, and Eliza A. Sheets claiming that it should be paid to her as guardian; the executor claiming that the money bequeathed to said Eliza A. Sheets by the fifth clause should be paid to her on her giving bond not to expend the principal, otherwise to be paid to a trustee and the income paid to her, and the said Eliza A. Sheets claiming that the same be paid to her to use and expend as she sees fit; what is left at her marriage or death to go to said Ira Sheets; and the executor claiming that Eliza Sheets is not entitled to the possession and control of the money bequeathed to her by the eighth clause of said will, but that the same should be paid to a trustee, and the income only paid to her; and the said Eliza Sheets claiming that she is entitled to the possession, use and control thereof until her marriage or death.

The third, fifth and eighth clauses are as follows:

“3. Subject to the above provision for my said wife, Eliza, I give and devise unto my said son, Ira Sheets, the said above described two tracts of land for the sole use of himself, his heirs and assigns, forever, and in addition thereto I give and

bequeath to him the sum of \$1,000, to be paid to him out of my estate on his arrival at twenty-one years of age.

"5. I give and devise to my beloved wife, Eliza, the sum of \$1,000, to be paid to her out of my estate as soon as practicable after my death, and which she is authorized to use in such way as she may see proper during her life, or so long as she may remain my widow. But upon her death or marriage, that part thereof which she may not have expended I give and bequeath to my son, Ira Sheets, for his sole use forever.

"8. And other personal property that may be over at my death, after paying the legacies herein provided for, I give and devise the use thereof to my beloved wife, Eliza, during her life, if she so long remains my widow, and upon her death or marriage, or should she renounce the will, I give and bequeath the same to my beloved son, Ira Sheets, for his sole use forever."

As to the third clause, the court below decreed that the \$1,000 to be paid to Ira Sheets on his arrival at twenty-one years of age, should be paid to certain trustees appointed by the court, who should hold the same, and pay the interest to be received upon it when loaned, to the guardian of said Ira Sheets until his majority, when the principal should be paid to him.

No complaint is made of this decree except that the money should at once be paid to the guardian of Ira Sheets. The real difficulty it seems to us is in determining who is entitled to receive the interest on this \$1,000 during the minority of Ira Sheets. Taking the literal language of the third clause, it would seem that the money must be held by the estate and is not due, either principal or interest, to Ira, until his majority. Taking the whole will into consideration however, it is quite reasonable to suppose that the intention of the testator was to give to his son, Ira, the use and benefit of the \$1,000 immediately, but to postpone the payment to him of the principal until his majority; we are inclined to think this is the correct view, and if it is, there is no error in the decree of the court in reference to the third clause.

In construing the fifth clause, the court held that Eliza A.

Sheets v. Wetsel.

Sheets, the widow, was only entitled to a life estate in the \$1,000 mentioned therein, and ordered that it might be paid to her, provided she gave bond conditioned that if she should again marry, or if she should not marry again, then that her legal representatives should upon her death pay to Ira Sheets the principal sum. The decree further provided that in default of giving such bond, the money should be paid to trustees, and the interest only paid to her.

We think this was not the proper construction to be given to this clause. It is well settled that the intention of the testator, if not inconsistent with the rules of law, must govern in the construction of a will. *Hamlin v. U. S. Ex. Co.*, 107 Ill. 443; *Henderson v. Blackburn*, 104 Ill. 227.

The language of the fifth clause, in our opinion, can admit of but one construction, *i. e.*, that the widow was to be paid the \$1,000, and she was to use the same in such way as she might see proper during her life, or while she remained the widow of the testator. She might entirely consume it or any part of it, if, in her judgment, her necessity required it. Only such portion, if any, which remained unexpended at her death or re-marriage would pass to and vest in Ira Sheets.

It is true the general rule is, that when the use of money is given to one for life, with remainder over to another, the former has no right to the possession of the money so bequeathed, but it should be put at interest, the interest paid to the tenant for life, and the principal retained for the remainder-man. *Welsch v. Belleville Savings Bank*, 94 Ill. 206. But the language of the fifth clause will not admit of such a construction.

Had the widow been given the use of \$1,000 and at her death or re-marriage the same to pass to Ira Sheets, the above rule would have prevailed. But the money is to be paid to her. She is then authorized to use it in such way as she may see proper; and to make his intention clear, the testator expressly limits the remainder over to Ira Sheets to "that part thereof which she may not have expended."

No language could make his intention clearer; hence we think the decree of the court as to the fifth clause of the will

was erroneous; and as to this \$1,000 the court should have directed it to be paid to the widow absolutely and without conditions. If she consumes it all so that there is nothing left for Ira Sheets, it is a contingency which the testator seems to have fully realized and provided for.

By the eighth clause, the property, of which the use is given to the widow, with remainder to Ira Sheets, clearly comes within the doctrine in the Welsch case, *supra*, and the decree provides for its disposition in accordance therewith. The decree of the Circuit Court will be affirmed as to the third and eighth clauses of the will and reversed as to the fifth.

The cause will be remanded with directions to the Circuit Court to amend its decree in accordance with the views herein expressed. The executors to pay the costs made in this court.

Affirmed in part and reversed in part with directions.

J. S. CAMPBELL ET AL.

V.

KATE MAGRUDER.

Dram Shops—Action by Wife—Injury to Means of Support—Pleading—Evidence—Instructions.

1. This court affirms, in view of the evidence, a judgment for the plaintiff, in an action brought by a widow under the Dram Shop Act, to recover from saloon keepers for injury to her means of support by reason of the death of her husband, the same being alleged to have been caused by liquor sold or given by them to him.

2. An instruction in such case, purporting to state the right of recovery in the words of the statute, should not omit the clause, "by giving or selling (to him) intoxicating liquors."

3. In the case presented, this court holds as proper the allowance of hypothetical questions on the basis of the undertaker's statements as to the contents of the dead man's stomach. It was for the jury to determine its weight.

[Opinion filed June 12, 1891.]

Campbell v. Magruder.

APPEAL from the Circuit Court of Coles County; the Hon. E. P. VAIL, Judge, presiding.

Messrs. JOE H. WINKLER, DAVID HUTCHINSON and JAMES J. FINN, for appellants.

Messrs. CLARK & CLARK, for appellee.

PLEASANTS, J. Appellee brought this suit under the Dram Shop Act against appellants, saloon keepers, for injury to her means of support by the death of her husband through intoxication caused by liquors sold or given by them to him. We presume the plea was not guilty, though the abstract is silent on that point. Plaintiff recovered judgment on a verdict for \$1,000.

There was evidence both positive and circumstantial, to support the finding upon all the material allegations, and also to the contrary. It is unnecessary to discuss it or to say on which side, in our opinion, was the preponderance.

Appellants assign for error, that the declaration states no time or place when or where the alleged wrongful acts of the defendants were committed; that the record does not show that any replication was filed, and that there was no issue joined.

From the abstract it appears that the first count alleged that plaintiff was the wife of Thomas Magruder up to the time of his death, which occurred on the 10th of October, 1889, at Coles County, Illinois; that the defendants "on, etc., and divers other days," sold and gave him intoxicating liquors, etc.; that the second count, after giving the place and date of his death, proceeds to charge that, *on the day aforesaid* the defendants *there* sold and gave, etc., and that the third and fourth set forth substantially the same facts as in the second. Thus in three of the four counts the time and place were averred. It may be presumed that the foundation for the statements that no replication was filed or issue joined, is the fact that the *similiter* was not added to the plea. The defects thus lately complained of are not so serious that the plea,

trial, verdict, judgment and statute of amendments and jeofails would not cure them.

No error in admitting or rejecting evidence is suggested in the argument, unless it be the allowance of hypothetical questions on the basis of the undertaker's statement as to the contents of the dead man's stomach; to which we see no objection, and none is particularly made. The witness did not pretend to know the contents, but he certainly had some means of forming an opinion, judgment and belief, and he stated it only as such. It was for the jury to determine its weight, and entirely proper to base the questions to the experts upon the hypothesis of its truth.

The first, second and fourth instructions given for the plaintiff, considered separately, are defective. Each of them states that plaintiff has a right to recover for the injury here complained of, if it was the direct result of her husband's intoxication, against any and all who caused his intoxication, in whole or in part—in the language of the statute, substantially, as far as it goes, but omitting the clause "by giving or selling (to him) intoxicating liquors." This is an essential element of the wrong. The statement in the declaration contains it, and the instructions also should have included it. Yet we can not reasonably suppose that the jury were misled by its omission in these, since it appears in those numbered six and seven, and is very clearly so declared in those given for the defendants and numbered two and three. Such also, would be the general understanding from the terms here used.

Plaintiff's third was somewhat loose, but the subject was so treated in defendant's second as to prevent the possibility of a mistake about it, if instructions could prevent it. The amount found is proof enough that there was none in fact.

Seeing no sufficient reason for a reversal, the judgment will be affirmed.

Judgment affirmed.

THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COM-
PANY ET AL., IMPLEADED, ETC.,
V.
MARSHALL P. AYERS ET AL.

Banks—Account of Several Corporations with, under One Name—Interest on Advances and Overdrafts—Recovery of.

1. Under an agreement between the president of several railroad companies and a bank, an account having been opened therewith by him in their behalf under a certain name, that said bank should be paid interest on advances and overdrafts, an action may be brought against all the companies to recover such interest.

2. The fact that one of such roads was being built and not in operation could not affect such right nor could the fact that as between themselves such companies kept separate accounts and had a system by which balances were struck.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Morgan County; the
HON. CYRUS EPLER, Judge, presiding.

Messrs. MORRISON & WHITLOCK, for appellants.

Messrs. BROWN & KIRBY and EDWARD L. McDONALD, for
appellees.

CONGER, P. J. On the 6th of March, 1887, Mr. W. S. Hook was the president of the following four railroad companies, to wit: The Jacksonville Southeastern Railway Co., The Chicago, Peoria & St. Louis Ry. Co., The Litchfield Carrollton & Western R. R. Co., and the Louisville & St. Louis Railway Co.

Mr. Hook as president of, and representing all of said companies, opened an account with appellees at their bank, under the name of the Jacksonville Southeastern Line.

In this account the earnings of, and payments for the four companies were all put together, and so far as the bank was concerned there was nothing in the manner of keeping the accounts or transacting the business, to show what proportion of the moneys were used for or belonged to the respective companies. Between March 6, 1886, and October of that year, Hook agreed with A. E. Ayers, one of the firm of M. P. Ayers & Co., the appellees, that the bank should be paid interest on all advances or overdrafts made on this account, and this action was brought against the four companies for this interest.

The Jacksonville Southeastern Ry. Co. and the Louisville & St. Louis Ry. Co. were defaulted, and the C., P. & St. L. Ry. Co. and the L., C. & W. R. R. Co. defended on the ground that they were not jointly liable. Appellees recovered a verdict and judgment for \$2,191.91.

The Louisville & St. Louis Railway Company was organized in September, 1886, and the road was built in the summer and fall of 1887, while it does not appear to have been fully completed and in operation until about January, 1888, from which fact, it is urged by appellants, this company could not have been a party to the arrangement by which the "*line*" was created; we see no force in this objection; whether the road was being built, or was actually completed, would make no difference. It existed as a corporation and had as much right to enter into the arrangement as either of the other companies, and in fact did so, although during the summer and fall of 1887, it was receiving from the general fund of the "*line*" for the expenses of its construction, and paying nothing in.

A great deal of testimony went before the jury to show that these corporations, among and between themselves, kept separate accounts and had a system by which balances were struck. While we have read this evidence with care, we fail to see how it can affect appellees. It was not the business of the owner of the bank to know what corporations composed the "*line*," or how the accounts stood as between them.

They had a right to adjust their account with the "*line*,"

Johns v. McQuigg.

and when it was found to be owing them a balance, to hold as responsible therefor all the corporations of which it was composed.

The instructions complained of are substantially correct, and we think that the judgment is just and supported by the evidence, and hence will be affirmed.

Judgment affirmed.

ROBERT JOHNS ET AL., FOR USE, ETC.,

V.

J. C. McQUIGG.

Sales.

In an action brought to recover for lumber sold and delivered, the contention being as to whether the defendant or a building contractor was liable therefor, this court declines, in view of the evidence, to interfere with the judgment for the defendant.

[Opinion filed June 12, 1891.]

'APPEAL from the Circuit Court of Christian County; the Hon. JACOB FOUKE, Judge, presiding.

Messrs. E. A. HUMPHREYS, J. G. DRENNAN and F. P. DRENNAN, for appellants.

Messrs. GROSS & BROADWELL and J. B. RICKS, for appellee.

WALL, J. This suit originated before a justice of the peace and was removed by appeal to the Circuit Court where, by agreement, the parties waived a jury and submitted the issues to the court. The finding and judgment were for the defendant and the plaintiffs bring the record here by appeal and assign error upon the action of the court in refusing certain propositions of law and in finding for defendant upon the questions of fact.

The plaintiffs' claim was for lumber furnished one Hartsock, who had a contract to build a house for defendant, and the only issue of fact was whether the lumber was sold to Hartsock or to defendant, or whether defendant bound himself to pay for it. On this point the evidence was in conflict and we can not say the conclusion of the court in respect thereto was incorrect.

There was certainly enough evidence to support the finding. The so-called propositions of law were merely propositions of fact, to the effect that upon the evidence the plaintiffs were entitled to recover.

We find no error and the judgment must be affirmed.

Judgment affirmed.

AQUILLA J. DAVIS ET AL.

V.

N. G. NICHOLS ET AL., SCHOOL DIRECTORS.

Eminent Domain—Site for School House—Mandamus to Compel Condemnation of.

1. Land held for a public use can be condemned for another public use when the latter is different from the former, and not inconsistent with, or destructive of, the rights of the public under the first.

2. The public square of a village can not be appropriated as the site for a school house.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Tazewell County; the Hon. N. W. GREEN, Judge, presiding.

Mr. B. S. PRETTYMAN, for appellants.

Messrs. WILLIAM DON MAUS, W. R. CURRAN and T. N. GREEN, for appellees.

CONGER, P. J. Appellants filed a petition, alleging that they were citizens and taxpayers of school district No. 1, etc.;

that the school house in such district was inadequate; that there had been a legal election by the voters of the school district to locate a site for a new school house; that at such election the northwest quarter of the public square of the village of Tremont was chosen as the site for a new school house; that the directors had applied to the president and trustees of said village to agree to a compensation for such ground; that the title to the square was in said president and trustees for said village; that they refused to agree to anything in relation thereto; that the school directors refused to take measures to condemn said ground for a school house site; and prayed that a writ of mandamus issue requiring said school directors to immediately proceed as required by law to have condemned, and have compensation for such school house site determined as required by the law of eminent domain, etc.

A demurrer was filed to the petition, which was sustained and the petition dismissed.

Several questions are raised by the demurrer and the arguments of counsel, but we do not deem it necessary to notice but one of them, *i. e.*, "that the site alleged to have been selected for a school house is already used and held and occupied for a public use and purpose, and it would be unlawful to use it for a school house." Upon this point appellant's counsel in his brief says:

"And the fee in land, held or taken for one public use may be condemned to another public use if that other is a different use. If the new use is for the benefit of the public, whether the change will be for the benefit of the public is a political question to be determined by the law-making power, and the authorized submission of the selection of a school house site to a popular vote is a determination by the people that it is for the public benefit; and that it is a new use can not be questioned; and the law requiring the directors to proceed and condemn it under the eminent domain law for that new use is a clear determination of it."

He cites the following cases as the authority for his position. *M. C. Ry. Co. v. C. W. D. Ry. Co.*, 87 Ill. 317; *Lake*

Shore & M. S. Ry. Co. v. C. W. I. R. R., 97 Ill. 506; C. & M. W. Ry. Co. v. C. & E. R. R. Co., 112 Ill. 589; People ex rel. v. Walsh, 96 Ill. 232. The first three of these cases hold that property appropriated by one railroad company does not prevent another company from condemning portions of the same for a new and different public use.

This doctrine is well established in this State; otherwise, as the court say in one of their opinions, one railroad could never cross another without consent.

In the Walsh case, *supra*, it is held that the Legislature may transfer the control of streets of a city or village to park commissioners to be by them improved and controlled for boulevard and park purposes, where such purposes are not inconsistent with their use for ordinary travel.

The general rule, we apprehend, is, that land held for a public use, can be condemned for another public use when the latter is different from the former and not inconsistent with or destructive of the rights of the public under the first; that portions of the land of one railroad, under certain circumstances, should be used for another public use, such as a railroad or public street crossing, is not inconsistent with or destructive of the first use, or of the rights of the public.

In the case at bar, however, the public square of the village of Tremont is held in trust for the public use, and it can not be appropriated to any other use inconsistent with or destructive of the first; that the building of a school house upon the public square of a village, whether such square be left open for public travel across it, or inclosed and used as a park, would be inconsistent with the original use, can not be doubted.

Suppose the voters of a school district were to select as a site for a new school house, the middle of a public street or the court house of the county; would it seriously be contended that such site could be enforced? *Princeville v. Auten*, 77 Ill. 326; *Jacksonville v. J. R. W. Co.*, 67 Ill. 541.

We are of opinion the demurrer to the petition was properly sustained.

Judgment affirmed.

Caldwell v. Evans.

ALVIN CALDWELL
V.
HENRY C. EVANS.

Set-off—Sec. 49, Chap. 79, R. S.

The claim of a plaintiff in a given case for unliquidated damages arising out of a tort, totally disconnected from the defendant's claim against the plaintiff, upon a note on which suit had been previously brought, is not such a claim or demand as should have been brought forward and adjusted in the suit upon said note.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Piatt County; the Hon. J. F. HUGHES, Judge, presiding.

Messrs. LODGE & HICKS, for appellant.

The case of Robison v. Hibbs, 48 Ill. 408, holds that unliquidated damages can not be set off in action on an account; but no construction of this statute is given. Such is the rule, no doubt, in the absence of this statute, but the very object of this statute is to save the expense which the application of that rule before justices would compel litigants of small claims to incur. In the later case of Lathrop v. Hayes, 57 Ill. 279, the Supreme Court fully discusses the statute and the object of its enactment, in the light of our own decisions and those of New York construing a similar statute, and arrives at the conclusion "that where one party commences his action before a justice of the peace, the adverse party, if he have *any* demands existing, must bring them forward, if capable of being consolidated into one defense," and the court says: "Indeed we do not see how it will bear any other construction without utterly disregarding the plain meaning of the words used; doubtless it was the intention of the Legislature to prevent the multiplicity of unimportant law suits in which small sums of money would be involved." The only exception made by the court from *any* demand is attachment

with constructive service. Of course, the demand must be one the justice has jurisdiction to hear; but to apply the same rules to such actions as are applied in courts of record on the subject of unliquidated damages, set-off, etc., defeats the very object of the statute. We submit the construction given in 57 Ill. is the reasonable and proper one to be given the statute, and under that rule this claim is barred. *Lathrop v. Hayes*, 57 Ill. 279.

Mr. M. R. DAVIDSON, for appellee.

Our proposition is, that Sec. 49, Chap. 39, R. S., does not modify the common law doctrine of set-off; that the rules of the common law are applicable in actions before a justice of the peace.

We find in examining the section in question, that it is the statute of 1845, re-written and changed as to the pecuniary limit of jurisdiction. In 1846 this statute received its first construction by our Supreme Court. We invite your attention to the case of *Hawks v. Lands*, 3 Gilm. 232, where the court in commenting upon this section says: "Unliquidated damages arising out of covenants, contracts, or torts totally disconnected with the subject-matter of the plaintiff's claim, are not such 'claims or demands' as constitute the subject-matter of set-off under our act of assembly. To give this construction to the statute would invest justices of the peace with full jurisdiction over questions involving the title to, and covenants concerning, real estate, compel parties to litigate all their rights of whatever nature or kind in one action and result in irremediable injustice and endless confusion." See *Bush v. Kindred*, 20 Ill. 94; *De Forest v. Oder*, 42 Ill. 502; *Robison v. Hibbs*, 48 Ill. 409. We confess we are too obtuse to discover wherein the case of *Lathrop v. Hayes*, cited by appellant, revokes or even modifies these decisions.

We invite the court's attention to what the courts have said later on. See *East v. Crow*, 70 Ill. 93; *Clause v. Bullock Press Co.*, 118 Ill. 617; *Hartshorn v. Kinsman*, 16 Ill. App. 557.

CONGER, P. J. This was an action originally commenced before a justice of the peace by appellee against appellant.

and upon appeal to the Circuit Court a verdict and judgment was rendered against appellant for \$95.

The claim of appellee was that appellant, in company with his two daughters, was driving some of his own colts along the road, when they jumped over into appellee's field, and got with appellee's colt, which had but recently been castrated. That appellant in trying to get his colts out of the field, so negligently and carelessly ran the colt of appellee about the field as to cause its death.

Appellant contended that due care was used that the colt was not injured by the running, but its death was caused by improper treatment when it was castrated.

We have carefully examined the evidence upon this question, and can not say that the jury were not warranted in reaching the conclusion they did. The evidence was contradictory, and in such case the jury having the witnesses before them had much greater opportunities of weighing the evidence than we have.

Appellant also insists that this claim for damages was barred because, after the death of the colt and prior to the present suit he had sued appellee before a justice of the peace upon a note which appellee owed him, and appellee should have brought forward this claim for damages and had the same adjusted in such suit, in accordance with the provisions of Sec. 49, Chap. 79, R. S., which provides that, "Each party shall bring forward all his demands against the other, existing at the time of the commencement of the suit, which are of such a nature as to be consolidated, * * * and on refusing or neglecting to do so, shall forever be debarred from suing therefor."

Appellee's claim is for unliquidated damages arising out of a tort, totally disconnected from appellant's claim upon the note upon which he brought suit, and hence was not such a claim or demand as would constitute the subject-matter of a set-off in that suit. *Hawks v. Lands*, 3 Gilm. 227; *Bush v. Kindred*, 20 Ill. 94.

Appellant refers us to *Lathrop v. Hayes*, 57 Ill. 279, as holding a contrary doctrine, but we do not view it in that light. In

that case the question was, where one is sued before a justice of the peace, and has a claim against his adversary within the jurisdiction of a justice of the peace, and a proper subject of set-off, must he bring it in as a set-off against his adversary's claim or commence a new suit. There is nothing in this case at all modifying or changing the holding in the Hawks case, *supra*.

It is said the instruction given to the jury for appellee is misleading in that it does not limit the kind of negligence which would render appellant liable. We do not think the instruction properly subject to this criticism, but if there were any doubt about it, the instructions given upon the part of appellant clearly and favorably lay down the law upon this question.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

THE TOWN OF BLOOMINGTON

V.

JOHN T. LILLARD.

Municipal Corporations—Liability for Attorney's Services.

A town is so far interested in a controversy involving the cancellation of spurious orders outstanding against it, as to justify the raising of money and incurring of liability in regard thereto, for the payment of professional services rendered therein.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

Messrs. KERRICK, LUCAS & SPENCER, for appellant.

Messrs. JOHN E. POLLOCK, for appellee, and JOHN T. LILLARD, of counsel, *pro se*.

City of Jacksonville v. Cherry.

WALL, J. This was a suit to recover \$100 for professional services rendered by the plaintiff in a suit in chancery to cancel certain spurious orders outstanding against the town. There is no question that the services were rendered and that they were worth the sum charged. The bill was approved and ordered paid at the regular town meeting, in April, 1890, by unanimous vote of the electors. The litigation was then pending. The only question is whether the town was *interested* in the controversy so that it might raise money and incur liability in regard thereto. We think it was. The validity of the orders in dispute affected the town finances and the town had a direct pecuniary interest in the premises. The power of the town is not limited to suits in which the town is *a party* but embraces those in which it is *interested*. The statute is broad enough in letter and in spirit to support the town's action in assuming to pay the bill, and that action was taken at the first opportunity after the suit was commenced.

The judgment will be affirmed.

Judgment affirmed.

THE CITY OF JACKSONVILLE
V.
JOHN CHERRY, JR.

Practice—Exceptions—Preservation of.

1. Unless an exception is preserved by embodying it in a bill of exceptions, no ruling, however improper, that does not relate to the pleadings, or appear on the face of the judgment, can be reviewed in an Appellate Court.

2. A recital inserted by the clerk in the record immediately following the judgment, to the effect that an exception was taken thereto, can not be regarded as a part of the record.

[Opinion filed June 12, 1891.]

APPEAL from the County Court of Morgan County; the Hon. O. P. THOMPSON, Judge, presiding.

39	617
68	602

Mr. RICHARD YATES, for appellant.

Messrs. GEORGE W. SMITH and OSCAR A. DELEUW, for appellee.

Per Curiam. This was an action of assumpsit for money had and received, which was tried by the court without a jury and resulted in a finding and judgment for plaintiff for \$574.15, to which, so far as the record shows, no exception was taken. It is true, as in *Martin v. Foulke*, 114 Ill. 206, and so many other reported cases, there is a recital inserted by the clerk in the record, immediately following the judgment, to the effect that such an exception was taken, but we can not regard that statement as a part of the record. If such an exception was taken, it could only have been made a part of the record by embodying it in the bill of exceptions, and we fail to find it there. The rule is inflexible, that without an exception so preserved, no ruling, however improper, that does not relate to the pleadings or appear on the face of the judgment, can be reviewed in an Appellate Court. Here the pleadings consisted of the common counts consolidated and the plea of non-assumpsit. It is not claimed that the judgment is erroneous on its face. We therefore can not consider the errors assigned, and the judgment must be affirmed.

Judgment affirmed.

BARBARA MAGERS

v.

J. A. DUNLAP.

Negotiable Instruments — Note — Alteration — Exemptions — Evidence — Consideration..

1. The alteration of a promissory note after delivery which in no manner changes the rights or interests, duties or obligations of the parties thereto, has no effect.

2. The words, "for labor" in the note in suit, do not import that the consideration was "wages" due the payee "as laborer or servant," within

Magers v. Dunlap.

the meaning of the exemption act. "Laborer," or "servant," as used in the statute, is a designation of a class of persons.

3. In an action brought upon a note given in payment for the professional visits of a physician, the defendant should not be allowed to state the number of visits made, in order to show a partial failure of consideration, she having received all that was promised for the note or gave it for what she received.

[Opinion filed June 12, 1891.]

APPEAL from the County Court of Moultrie County; the Hon. C. N. TWADDELL, Judge, presiding.

Mr. R. M. PEADRO, for appellant.

Mr. JOHN R. EDEN, for appellee.

PLEASANTS, J. This was on a suit on a promissory note made by appellant to appellee, commenced before a justice of the peace and appealed to the County Court, where a verdict was returned and judgment thereon rendered for plaintiff.

The note offered in evidence purported to be "for labor." Defendant claimed that these words were added to it after delivery, without her consent, and therefore on oath denied its execution. It appeared that plaintiff was a physician and the note given for professional services. He testified that there had been no alteration and was corroborated. She contradicted, and was also corroborated. It was for the jury to find the fact. The court refused the instructions asked by defendant relating to the effect of the alteration alleged.

Assuming it was made as she stated, yet if it in no manner changed the rights or interests, duties or obligations of either of the parties, it had no effect. *Vogel v. Ripper*, 34 Ill. 106. It is said the object of it was to deprive this widow of the benefit of the fourth section of the exemption act. We think the words "for labor," do not import that the consideration was "wages" due the payee "as laborer or servant." "Laborer" or "servant," as used in the statute, is a designation of a class of persons. *Epps v. Epps*, 17 Ill. App. 196. The term "labor" furnishes no such indication. Labor may be as well performed without "wages" as for them, and by one

class as well as another. In this case the evidence makes it clear that the plaintiff was not a "laborer or servant" and the note was not for "wages," in the statutory sense. Hence there was no ground for the judgment of the justice, if it was intended to obviate the effect of the exemption act. But his judgment is not here under review. The trial on appeal was *de novo* and the judgment of the County Court was just what it would or should have been if these words had not been in the notes. No right of the defendant has been or can be affected by them. Being thus immaterial, the motive or purpose of plaintiff in adding them, if he did add them, could not properly be inquired into. *Vogel v. Ripper, supra; Moie v. Herndon*, 30 Miss. 110.

Appellant was asked by her counsel how many professional visits she received from appellee, and others of the same character, which the court excluded. The object was to prove a partial failure of consideration, but the proposed evidence had no tendency to prove it. If she received all she was promised for the note, or understandingly gave it for what she did receive, then whether it was worth much or little in the estimation of the jury—five dollars or seventy-five—there was no failure of consideration. The rulings complained of were right, and the judgment will be affirmed.

Judgment affirmed.

39 620
51 25

EMMA SAUERBIER ET AL.

V.

UNION CENTRAL LIFE INSURANCE COMPANY.

Life Insurance—Policy—Reformation—Assignment of—Evidence.

1. As to ordinary policies of life insurance, the beneficiary has a vested interest which is beyond the control of the party procuring the insurance.

2. An intended beneficiary need not be named in order to invest him with such interest, unless required by the policy, and a father may thus provide for his unborn child.

Sauerbier v. Union Central Life Ins. Co.

3. Where the description is uncertain in such case, parol or other extrinsic evidence is admissible to aid it.

4. The assurance by the agent of an insurance company of the sufficiency of the statement in, and signature to an application, to accomplish the purpose of the applicant, will bind the company.

5. The acceptance of an application and the making of it a part of a policy by an insurance company will estop it to deny the interest of children mentioned together with a wife in the application, although the policy mentions the wife as the sole beneficiary.

6. In the case presented, this court holds that the beneficial interest was intended to be in the wife and children equally, *per capita*, and that the policy should be construed in accordance with the intention of assured.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of McDonough County;
the Hon. C. J. SCOFIELD, Judge, presiding.

Messrs. AGNEW & VOSE, for appellants.

The application specially provides that the children shall be beneficiaries. When the company accepted the application, the minds of the parties met and the contract was complete. It is not necessary that the policy should be issued and delivered to the insured. *Mactier v. Frith*, 6 Wend. 119; *Taylor v. Merchants Fire Ins. Co.*, 9 How. 398.

The assured clearly expressed his intention in the application that his children should share with his wife as beneficiaries, and the company by express terms makes the application a part of the policy.

The application may be a part of the contract when the policy so provides. *Bacon on Benefit Societies and Life Insurance*, Sec. 181.

The agent who solicited this insurance was the agent of the company and not of the insured, and had the right to agree with the insured as to the effect and meaning of the words employed in answer to the questions in the application. *Bacon on Mutual Benefit Societies and Life Insurance*, Sec. 153, 221; *May on Insurance*, Sec. 120; see *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Ct. 465.

The statement in the policy that the party soliciting the insurance is the agent of the insured and not of the company,

does not establish such fact. *Kansal v. Minnesota, etc., Ins. Co.*, 31 Minn. 17; *Commercial Ins. Co. v. Ives*, 56 Ill. 402.

A court of equity has power to reform a policy so as to make it conform to the intention of the parties.

It is hardly necessary to cite authority on this proposition. We refer to *Gillespie v. Moon*, 2 Johnson's Chancery Report, 596, for a full discussion of the law and decisions upon this subject. Also to *Snell v. Insurance Co.*, 98 U. S. 85; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Ct. 465; *Williams v. North German Ins. Co.*, 24 Fed. Rep. 625; *Keith v. Globe Insurance Co.*, 52 Ill. 518; *West et al. v. Menard Co.*, 82 Ill. 205.

The application almost wholly controls in determining the intention of the parties. *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige Ch. Rep. 278.

In *Motteaux v. London Ins. Co.*, 1 Atk. 547, Lord Hardwicke held that a policy ought to be rectified agreeably to the label, and that the label was the real contract between the parties. See *Franklin Fire Ins. Co. v. Hewett*, 3 B. Monroe.

It is not expected that a policy holder will read his policy. *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige Ch. Rep. 278; *North British & Mercantile Ins. Co. v. Steiger*, 26 Ill. App. 228.

Have the beneficiaries a vested interest in the policy which is beyond the control of the insured?

There is a well defined distinction between a mutual benefit society and what is ordinarily termed an old line insurance company. In the former the certificate of membership is the property of the member and can be changed at his will. In an ordinary life insurance company the policy is not the property of the insured in any sense, but it is the property of the beneficiary from the day of its issue, for from that time he has the whole beneficial interest. Niblack on Mutual Benefit Societies, Sec. 201; Phillips on Insurance, Sec. 2058-60; Bliss on Life Insurance, Sec. 318, 517; *Chapin v. Fellows*, 36 Ct. 132; *Stillwell v. Mutual Life Ins. Co.*, 72 N. Y. 385; *Wilburn v. Wilburn*, 83 Ind. 55; *Washington Life v. Haney*, 10 Kan. 525; *N. Am. Life Ins. v. Wilson*, 111 Mass. 542.

The principle asserted in the above cases is fully indorsed in *Glanz v. Gloeckler*, 10 Ill App. 484.

Sauerbier v. Union Central Life Ins. Co.

As to the question, did Leonidas Lodge have authority to purchase the policy, and if so what interest did it acquire therein, the doctrine that a corporation can perform only such acts as are authorized by its charter, is applicable. In *Fietsam v. Hay et al.*, 122 Ill. 294, Justice Mulkey says: "Now a franchise is nothing more than the right or privilege of being a corporation and doing such things, and such things only, as are authorized by the corporation's charter."

Leonidas Lodge was incorporated "for the practice of friendship, charity and benevolence."

The lodge paid \$268.81 for the policy. If this transaction was an absolute sale of the policy, it was a wager contract and void. If the payment of the \$218 was a loan and the assignment of the policy taken as security, then the lodge can only recover the amount of the loan. *Cammack v. Lewis*, 15 Wal. 643; *Ins. Co. v. Robertshaw*, 26 Pa. St. 189; *Warnock v. Davis et al.*, 4 Mors. Trans. 93, cited in 11 Fed. Rep. 527.

Messrs. SMITH, McELVAIN & HERBERT, for Leonidas Lodge, Knights of Pythias, No. 87.

There is no variance between the application and the policy. The requirement in the application that the name of the beneficiary should be stated therein in the proper blank, was met by the insertion of the name "Emma Sauerbier," wife. In order to constitute a person a beneficiary, the name should appear in the policy as such; and the only purpose that could be served by inserting such name in the application is to furnish the insurer with such name so that it may be inserted in the policy. The policy was written in accordance with the conditions of the application, was forwarded to the company, and the premium was paid. This constituted a completion of the contract. *May on Insurance*, 2d Ed., Sec. 56.

The company had the right to require the name or names of the persons for whom the insurance was sought to be written in the application by the insured, as a precaution and protection to itself. The mere statement, "my children," was not a compliance with that requirement of the application, and hence was not considered by the company when it

wrote up the policy. "My children" is comprehensive and at the same time indefinite. What children? Those only by Emma Sauerbier? Would it include illegitimate, as well as legitimate? Beneficiary's name must appear in policy. *May on Insurance*, 2d Ed., Sec. 113.

The issuance by the company and the acceptance by Sauerbier of the policy for the sole benefit of "Emma Sauerbier," was a completion of the contract as set out in the application.

The contract of insurance is between the company and the insured, and he may alter and change beneficiary with consent of company. *Swift v. R. P. & F. C. Ben. Ass'n*, 96 Ill. 312.

Even if Emma Sauerbier had a vested interest in the policy, she could assign her interest therein. *Norwood et al. v. Guerdon*, 60 Ill. 253; *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398. But Emma Sauerbier had no vested interest in the policy by virtue of her being made the beneficiary. *Swift v. R. P. & F. C. Ben. Ass'n*, 96 Ill. 314; *Martin v. Stubbins*, 126 Ill. 387. The insured can control the policy. *Johnson et al. v. Van Epps*, 110 Ill. 551; 96 Ill. 309, above cited; *Wheeler v. Mortland*, 21 Ill. App. 177.

And the policy may be assigned to one not having an insurable interest, with consent of insured. *Johnson v. Van Epps*, 110 Ill. 551; *Martin v. Stubbins*, 126 Ill. 387; *May on Insurance*, 2d Ed., Sec. 110.

Attorneys for appellants can only recover by a reformation of the application and policy by the substitution of the names of the children as beneficiaries. Can this be done? Courts of equity will not reform written contracts as to mistakes therein, unless those mistakes were mutual, and are understood alike by the parties to the contract. *Sutherland v. Sutherland*, 69 Ill. 481; *Lanier v. Wyman*, 5 Rob. (N. Y.) 147. Both parties are presumed to have understood the legal effect of their contract. *Sutherland v. Sutherland*, 69 Ill. 488.

Where a party seeks to rectify a written instrument on the ground of mistake, the rule is, the evidence must be such as to leave no fair and reasonable doubt that the instrument does not embody the final intention of the parties. *Kerr on Fraud and Mistake*, 421.

A mistake on one side may be ground for rescinding, but not for correcting and rectifying an agreement. 1 Story, Equity Juris., Sec. 152; Kerr on Fraud and Mistake, 422; Douglass v. Grant, 12 Ill. App. 273.

Equity will not correct or reform a contract where there is a mistake of law as to the effect of the language used by the parties, in the absence of fraud, and where there is no mixture of oppressive abuse of confidence, or surprise in matters of fact. Gordere v. Downing, 18 Ill. 492.

A mistake as to legal rights is not a ground for equitable relief. Weed v. Weed, 94 N. Y. 243.

A mistake in fact may be a ground for equitable jurisdiction, if it is made to appear satisfactorily. But this does not extend to mistakes in the law of the contract, or in the intention of one of the parties, or the mistakes of legal terms agreed upon between the parties, without fraud. Ruffner v. McConnell, 17 Ill. 212.

A mere misunderstanding of the facts is not sufficient ground for asking a reformation of a contract; fraud or mistake is indispensable. Storey v. Conger, 36 N. Y. 673 (9 Tiff.).

The name of Emma Sauerbier alone appearing in the policy as beneficiary, and she having assigned or released her interest, Leonidas Lodge had no notice of other parties claiming to be beneficiaries at the time of the assignment of said policy by Sauerbier to it. The lodge was a *bona fide* purchaser or assignee without notice, and hence the policy must stand as written. Wait's Actions and Defenses, Vol. 5, 452; Kilpatrick v. Kilpatrick, 23 Miss. 124.

The validity of a transfer of personal property to a corporation can not be successfully assailed on the sole ground that the execution of the transfer, or its acceptance, involved an unauthorized exercise of corporate power. Morawetz on Private Corporations, 2d Ed., Sec. 712.

PLEASANTS, J. The material facts in this case are agreed on. On November 1, 1882, appellee, an old line insurance company of Cincinnati, Ohio, issued to John Sauerbier, the husband of Emma Sauerbier, and father by her of the other

appellants, a policy upon his life for \$1,000. To the agent who solicited and took his application for it, he stated that he wanted the insurance to be made in favor of his wife and children, and so fixed that if any more should be born to him they should share therein equally with those then living. On its face, among other things, the following appears in print: "10. Name of the party in whose favor the insurance is proposed," and immediately following, written by the agent, "Emma Sauerbier and my children." In print: "11. Relationship, if any, to the party whose life is proposed to be insured," and immediately following in the handwriting of the agent, "wife and children." The signatures to it, which are on the right of the page, as usual, are first, "Jno. Sauerbier," in his own hand, on a line just over a printed note indicating it as the place for the signature of party insured, and on a line next under it "Emma Sauerbier and my children, by John Sauerbier," in his handwriting, over a like printed note indicating it as the place for the signature of the "beneficiary."

On the left, opposite to them, appears the following: "Witness, M. C. Carr, M. D.," and under this, "approved by E. R. Farnam, agent," notwithstanding the intervening space is occupied by a finely printed note that—"In every case the party whose life is to be insured must sign this application and declaration for himself. He must also sign for the beneficiaries (unless such beneficiaries sign for themselves) as follows: The husband may sign for his wife, and the father for his children, and the debtor for the creditor. *Example: Children—*'Jane and Mary Smith, by John Smith.'"

Thus it appears that the applicant intended and expected the policy to be made out for the benefit of his children as well as of his wife, including those, if any, who should thereafter be born, and whom, for that reason, he could not then name, and that Mr. Farnam, the agent of the company, fully understood this intention, wrote the words that expressed it in the application, approved the signature for the children as made, assured the applicant that the expression thus used would make them beneficiaries, and agreed with him that the

Sauerbier v. Union Central Life Ins. Co.

policy should so provide. The policy expressly makes the application part of it, but names as beneficiary Emma Sauerbier only, and outside of the application makes no reference to any other.

Some time after¹ its issuance, mutual dissatisfaction arose between the insured and his wife. A bill for divorce was filed by her, and a cross-bill asking the same relief, by him. An arrangement was made between them whereby he withdrew his charge and claim and all opposition to hers, and she, in consideration thereof, signed a statement that she had assigned to him all her interest in the policy. After that he became a member of Leonidas Lodge, Knights of Pythias, of Murphrysboro, Ill., and still later, afflicted with a lingering disease, on account of which the lodge expended in caring for and burying him, \$268.81 more than he was entitled to under its by-laws. In view of such expenditure he assigned to it the policy in question and gave notice thereof to the company. After his death the lodge made the necessary proofs and claimed the insurance. His widow then brought suit for it. The company filed its bill asking that these claimants be required to interplead and offering to pay the money into court. Her attorneys then filed a petition of the children to be made parties and allowed to interplead also, and on leave obtained, filed a bill setting up their relation to the insured, his intention with respect to the insurance, and the statements, acts and agreements of the company's agent as above stated, and asking that the policy be reformed or construed to conform to said agreement and make them beneficiaries.

The issues having been made up were tried by the court, and a final decree was entered, dismissing the children's bill, and in favor of the lodge for the full amount of the policy; from which decree this appeal was taken.

The controversy here is between the children and the lodge. It is contended, on behalf of the lodge, that the children had no interest as beneficiaries, because they were not named in the policy.

By agreement of the parties, the original policy, including the application, was left with the clerk for our inspection.

We do not find in it any condition or provision making it essential that the intended beneficiary should be named in order to invest him with the interest. All that appears in relation to the name is in the note above quoted, which seems to be only directory.

Of course, he should be identified, and the name is the usual, and generally the best, means for the purpose. But, clearly, it is not the only means, nor in all cases practicable, as is shown in this. A father may make this provision for his unborn child. The name, therefore, can not be essential, unless made so by the contract: *Clinton v. Hope Ins. Co.*, 45 N. Y. 460; *Burrows v. Turner*, 24 Wend. 275; and where other description is uncertain, parol or other extrinsic evidence is admissible to aid it. *Ibid.* And if in this case the company could have had any special interest in the particular means of identification, or intended any more than that the name should be given where it was practicable, we hold it would be bound by the assurance of its agent to the applicant of the sufficiency of the statement and signature here used, to accomplish his purpose. Such assurance was within the scope of his power. *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Am. Cent. Ins. Co. v. McLanathan*, 11 Kan. 533. There was no misrepresentation of fact, nor any obscurity of meaning. The only defect alleged is in the mere form of the statement and signature. The agent, doubtless, believed it was sufficient and proper for the purpose intended, and the applicant was justified in relying upon his judgment in respect to it. The company was not thereby misled into any risk it would not otherwise have taken. His intention was plainly manifested by the application, and it should have issued a policy conforming to it, or given him the opportunity to apply elsewhere. Having accepted the application and made it a part of the policy, it should be estopped to deny the interest of the children. *May on Insurance*, Sec. 120; *Bliss on Life Ins.*, Sec. 290, *et seq.*; *Wood on Fire Ins.*, 2d Ed., Vol. II, pp. 843-4, and notes.

The company is not here denying it; it is the lodge that denies it. It claims under the insured, their deceased father,

and can have no better right than his. If anybody should be estopped to deny that they were beneficiaries, certainly he should.

But it is said that if they were, they had no vested interest, and that he, as the insured and contracting party, could change the beneficiary and control or assign the policy without consent of the latter; citing *Swift v. R. P. & T. C. Ben. Ass'n*, 96 Ill. 312, and other cases, in all of which the certificate of membership is in mutual benefit societies organized under statutes. These instruments are in the nature of policies of insurance, but are distinguished from them in some respects, of which the particular case here in question seems to be one. As to ordinary policies we apprehend the rule is that the beneficiary has a vested interest which is beyond the control of the party procuring the insurance.

The text writers concur on that point. *Bliss*, Sec. 318; *May*, Sec. 390; *Bacon*, Sec. 304; *Niblack*, Secs. 171, 201. It was recognized in *Glanz v. Gloeckler*, 10 Ill. App. 484; *S. C.*, 104 Ill. 573; and was expressly held in *Hubbard v. Stapp*, 32 Ill. App. 541. See also the *Central Bank of Washington City, v. Hume*, 128 U. S. 206, where the same rule is declared and authorities are cited. Then if the children were beneficiaries the assignment of the policy by the insured to the lodge was ineffectual against them. The wife's interest went to him under her release or assignment, and therefore passed by his, to the lodge.

We hold that the beneficial interest in the insurance was intended to be in the wife and children equally, *per capita*, and the policy should be so construed. We do not deem it necessary to consider the supposed difficulties in the way to a reformation of it. There is a growing inclination on the part of the courts even at law, to accomplish the same purpose by construction and the application of the doctrines of estoppel and waiver, whenever the cases admit of it. *May on Ins.*, Sec. 566, and cases cited in the notes; also *Am. Cent. Ins. Co. v. McLanathan*, *supra*; *State Ins. Co. v. Shreck*, 27 Neb. 527; *German Ins. Co. v. Miller* (opinion of this court at this term). Here the contract refers to the beneficiary in

three places. In two of them the children are expressly shown to be intended as such together with the wife. In one they are omitted. They ought to have been included there also, and the court will treat as done that which ought to have been done.

For these reasons we think it was error to dismiss the children's bill and award the whole amount of the insurance to the lodge. The decree will, therefore, be reversed and the cause remanded for further proceedings in conformity with the views here expressed. The costs of this appeal are adjudged against the lodge.

Reversed and remanded.

THE GRAPE CREEK COAL COMPANY

V.

THOMAS L. SPELLMAN ET AL.

Written Contract—Specific Performance—Bill to Enforce—Injunction.

Chancery will not entertain a bill to specifically enforce contracts relating to personal property; nor contracts which by their terms call for a succession of acts whose performance can not be consummated by one transaction, and which require protracted supervision and direction.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Vermillion County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. J. B. MANN, for appellant.

Messrs. W. J. CALHOUN and M. W. THOMPSON, for appellees.

WALL, J. The appellant filed a bill in chancery against the appellees to enforce specific performance of a certain written contract executed by the parties, providing as follows:

“*First.* The said Spellman (one of the appellees) to sell

Grape Creek Coal Co. v. Spellman.

and the said coal company (appellant) to buy the out-put of his mine, the minimum amount being not less than 2,000 tons of lump coal per month, the price for which should be \$1.12½ based on a mining rate of sixty-five cents, and the mixed coal at \$3 per car, large or small.

“*Second.* The said Spellman to give his services, turning over his trade to said coal company for the sum of \$100 per month and expenses. The said arrangement to terminate April 1, 1891.”

The bill averred that the coal in question was of superior quality, having an established reputation, and that complainant had built up a large trade in disposing of coal of the same grade; that Spellman entered upon the performance of the contract and continued therein for a time, but that afterward and without any reasonable cause, refused to deliver coal under the contract, whereby and because of the alleged insolvency of Spellman the complainant had no adequate remedy at law. Prayer for specific performance, by means of an injunction restraining the defendant from selling his out-put to any one except the complainant and for an account to be taken of the damages sustained.

The answer denied that there was a special or peculiar quality in the coal, as alleged, or that the product of such coal was limited; denied that the complainant had built up a large trade dependent upon this coal; admitted refusing to furnish coal under the contract, but set up as an excuse that complainant had for a considerable time failed to make payments under the terms of the contract, thereby causing the defendant great embarrassment financially, and averred that he was always ready and willing to carry out the contract on his part and would have done so if complainant had paid for the coal delivered when payment was due.

The cause was heard and a decree was entered dismissing the bill.

There was some conflict upon the questions of fact raised by the answer; but we think it very clear that no case appears for the relief asked by the bill and peculiarly to be afforded by a court of chancery. Indeed, upon the face of the bill and

the contract as therein set out, it is difficult to see what there is to give jurisdiction.

It is apparent that the damages alleged can be ascertained at law, and we see nothing to prevent the application of the general rule, that chancery will not entertain a bill to specifically enforce contracts relating to personal property; nor contracts which by their terms call for a succession of acts whose performance can not be consummated by one transaction, and which require protracted supervision and direction.

A court of equity would not undertake to compel a contractor to build a railroad or a warehouse, nor can it successfully enforce an agreement for the operation of a mine or a manufactory. In the very nature of things, relief in respect to matters of that sort would be out of the question because not practicable. Here the court can not compel the defendant to employ men to work his mine, operate his machinery, furnish necessary supplies, produce the coal, and deliver it to the complainant. A succession of continuous acts calling for his personal services and for the exercise of his judgment, experience and tact in reference to a complicated business, can not be specifically compelled as would be necessary in this instance. Indeed, the complainant seeks to avoid this difficulty by praying for an injunction to restrain the selling of the coal to others; but this would not give him the coal, nor does it accord with his theory of relief that he needs this particular variety of coal to supply his trade. A court of equity will not assume what it can not practically accomplish. Another difficulty is that by the terms of the contract the period was limited. That period was rapidly passing when the bill was filed and has now expired.

In effect the complainant was merely seeking an assessment of damages for a violated contract in regard to personal property and personal services. A court of chancery could not properly grant the desired relief. The decree will be affirmed.

Decree affirmed.

THE GERMAN INSURANCE COMPANY

v.

JOHN O. MILLER.

30 633
30 629

Fire Insurance—Policy—Correction and Reformation of—Estoppel—Application—Conditions.

1. A court of equity will correct and reform a policy of insurance, where by fraud, accident or mistake it has been improperly drawn, but it is not necessary to seek such relief where the doctrine of estoppel may be applied.

2. A condition in a policy declaring that a mortgage or incumbrance of the property mentioned therein avoids the same, is not wholly broken by a mortgage of a part of the property, consisting of separate articles, and capable of specific valuation, and in such case the insurance would be vitiated as to the part so mortgaged only.

3. Answers written in an application for fire insurance, by an agent, without the assent of the applicant, will not bind him.

4. An insurance company can not insist upon non-ownership of personal property covered, to avoid payment, where assured informed its agent at the time the application was signed, that another person was interested in a certain portion of it, but was told by such agent that the property could be written in his name.

5. Conditions involving a forfeiture should be strictly construed.

6. A company will not be permitted to avoid a policy upon ground of over-valuation of property covered, where its agent saw the same at the time the application was filled out, and assented to the figures.

7. A mistaken or untrue statement of a material matter will not avoid a policy, when the company or its agent knew the real facts, especially where an agent fills up the application and knowing the real facts misstates them, either purposely or by mistake.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Logan County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. BEACH & HODNETT, for appellant.

Messrs. BLINN & HOBLIT and E. LYNCH, for appellee.

WALL, J. This was an action of assumpsit upon a policy of insurance, in which the plaintiff recovered a judgment for

\$826.25. By the appeal of the company the record is brought here.

The policy covered a building called an implement house and certain implements and machinery therein.

The evidence tends to prove that the agent of the company solicited the appellee to make application for the insurance, and induced him to sign the application; that when the appellee so signed, only two of the questions were answered, viz., as to the valuation of the property, real and personal, and as to the description of the lots on which the building was situate; that these answers were written by said agent, and that the answers to the other questions were subsequently written therein by said agent, without the knowledge or consent of the appellee. There is but little conflict as to this part of the testimony, the agent not appearing to deny what the appellee has sworn and the only contradiction consisting of an alleged admission by appellee to the adjuster, which appellee says he did not make. Without discussing this branch of the evidence in detail, it is sufficient to say that the jury had abundant reason to accept the version of the appellee.

It follows, that as to all the answers so written by the agent, without the assent of the appellee, the latter is not responsible, and the attempt of the company to escape liability, because they are untrue, must fail. These relate mainly to the condition of the property as to incumbrances, to the proximity of other buildings, and to the ownership of the property. When appellee signed the application, he was standing with the agent, in full view of the property, and nothing was said by either of them as to any incumbrances, or as to danger from adjacent structures; but appellee did state that he was not the sole owner of all the property, and that one Naugle owned a share in a small part of it, to which the agent said in reply, that appellee could take the insurance in his own name and collect from Naugle his proportion of the premium.

It hardly requires the citation of authority that under such circumstances the company can not insist upon a defense based on the ownership of the property. It would work a

gross fraud to successfully interpose such an objection. This interest of Naugle's was as to some of the implements, mere personal property. The clause in the policy upon which reliance is placed, reads thus: "or, if the assured shall not be the sole and unconditional owner in fee simple of said property." This language aptly refers to real estate, and not to personalty. It is the language of the insurer, and when he seeks to avail of it to produce a forfeiture of his contract, it should be construed strictly against him. It is hardly sufficient to reach the present condition where a part only of the property, and that personalty, was owned in partnership.

It is said, also, in the briefs, that by the verdict the jury did not allow for this item, but, whether so or not, we think there is no cause herein to disturb the judgment.

As to the alleged over-valuation contained in answer to the first question, there seems to be nothing very substantial in the proof. The agent saw the property and had reasonable opportunity to judge of its worth. He was inclined to urge appellee to make the policy as large as possible. Doubtless his interest was in that direction. He assented to the figures, indeed, appellee says he suggested them; and even though they may have been rather too high, the company should not be permitted to avoid the policy on this ground.

In the answer to the second question, the lots are described as lots 3 and 4, block 7, of Lawndale. When this question was asked, the appellee said he was not sure as to the description, but thought this was right. The agent said it was not very important, but that he was going to the county seat, would examine the record in the clerk's office and would get the proper description, "and put it in all right."

It now appears that the numbers of the lots and blocks were correct, but that the property was in Ewing's addition to Lawndale and not in the original plat, which also contained lots bearing the designation 3 and 4, in block 7, and it is urged that this is such a misdescription as to render the policy invalid in a court of law, where there is no power to reform it.

The suggestion is, therefore, that appellee should have applied to a court of equity for a correction of the policy, and that he is in no condition to recover at law.

It may be remarked at the beginning that it was wholly immaterial whether the property was in Ewing's addition or in the original plat of the town; that it was in the full view of the agent and he knew what it was. He was not misled and the true description was a mere formality. He was insuring that property regardless of its designation on the record.

Moreover he expressly undertook to examine the record and correct the description, if necessary. He did not do so. The error was carried into the policy. It was not discovered by the insured until this trial.

Should he be required to dismiss this suit and go into a court of equity?

The policy provides that no suit at law or in equity shall be sustainable unless brought within six months after the loss may have occurred. If this provision is valid it would bar the remedy by reformation unless some considerations might appear excusing the delay. We do not undertake to say what might be the result of such a suit, but we are very clear that under the circumstances the appellee should not be driven to that forum for relief.

It has been held repeatedly and is now the uniform current of decision, that a mistaken or untrue statement of a material matter will not avoid the policy when the company or its agent knew the real facts; and especially is this true when the agent fills up the application, and knowing the real facts, misstates them either purposely or by mistake.

This doctrine is frequently applied in the very important issue often raised as to whether there was other insurance, or whether the condition of the risk as to other buildings was truly stated. May on Ins., Secs. 497-9; Wood on Ins., Secs. 139-141, and notes.

Applying the same principle here, the objection now interposed should be disregarded. The agent knew that there was doubt as to the description, and he agreed to see that it was made as it should be. Upon the common doctrine of estoppel, the company should not be heard to set up this defense. It should not be allowed to say, "true, we know you were uncertain as to the number of your lots; true, we told you it

was not material, and that we would examine the record and correct the description if wrong, and that we have not done it though we knew you relied upon our assurance." It is not easy to state a case where the doctrine of estoppel, now so frequently and properly invoked in actions upon contracts of insurance, would be more justly applicable than here.

There was no variance between the application and policy or proofs, but the point is, that was a misdescription all the way through.

In this State it is well settled that a court of equity will correct and reform a policy of insurance where by fraud, accident or mistake, it has been improperly drawn. It does not follow, however, that it is necessary to seek such relief in cases where the doctrine of estoppel—an equitable doctrine now recognized at law, may be applied. Courts of law, by adopting this doctrine, which forbids the assertion of the inequitable defense, have rendered it unnecessary to invoke the aid of chancery.

In May on Insurance, Sec. 566, it is said that in most of the States "courts of law will apply the doctrine of waiver and estoppel so as to enable the plaintiff to maintain his action for indemnity and not drive him to a court of equity." So it was held in *State Ins. Co., etc., v. Schreck*, 27 Neb. 527, where there was a misdescription of the land on which the insured property was situated, the court quoting the foregoing extract from May.

There is, however, another view of the matter which would render the question of reformation not important. The policy refers to the property insured thus :

"Situated (except as otherwise provided) and confined to premises now actually occupied by the assured, to wit, in the county of Logan, lots 3 and 4, block 7, of Lawndale, Ill."

It might be a fair question whether, by this language, it was intended to describe the lot and block mentioned as being in any particular plat of Lawndale. It is "of Lawndale, Ill." Until it is shown that there are two plats—one the original, and one Ewing's addition, containing, each, lots and a block so designated, there is no difficulty; but when this appears there is an ambiguity. The ambiguity thus produced is latent, and

may be "holpen by averment." 1 Greenleaf on Evidence, Sec. 297.

If, however, it is the proper construction that the language designates lots 3 and 4, block 7, in the original plat, etc., then there is a description true in part, but not true in every particular.

The first clause refers to "premises now actually occupied by the insured," which in fact were in Ewing's addition. It was shown that the insured occupied no other property, and the latter clause, if construed to refer to the original plat, was a false description and may be rejected according to the maxim, "Falsa demonstrat; non nocet." *Ib.* Sec. 301; *Sharp v. Thompson*, 100 Ill. 447.

In *Am. Cent. Ins. Co. v. McLanatham*, 11 Kan. 533, the property insured was described as "his two-story frame dwelling occupied by him, situate southwest corner Second and *Vine* streets, Leavenworth."

As a matter of fact, the house was on the corner of Second and *Elm* streets. It was held by the court: "In such case the contract is not void for uncertainty, nor is there need of applying for a reformation of the contract, provided it appears, either from the face of the instrument or intrinsic evidence, which is the true and which the false description." The opinion, by Brewer, J., proceeds at some length, citing authorities and discussing the question involved, but further quotation is unnecessary.

We are of opinion the defense here interposed, resting upon supposed or actual misdescription of the insured property, must be overruled.

It remains to consider the point vigorously pressed upon us, that the policy was rendered invalid by subsequent mortgages placed upon two items of the personal property covered by the policy.

The items were a stacker, mortgaged to Nichols & Shepherd, and a sheller, mortgaged to Pegram. The verdict of the jury evidently excluded their value, and the company is thereby relieved from its contract to that extent. It is urged, however, that the effect of thus incumbering a part of the insured property is to vitiate the whole policy.

The condition relied upon is as follows: * * * “or, if the property shall hereafter become mortgaged or incumbered * * * then * * * this policy shall be null and void.” Here, again, it is to be noticed that the language employed is the language of the company, and the condition is invoked for the purpose of working a forfeiture, in order that the company may escape liability under its contract, and the rule of strict construction must be applied. It is not provided that if the property, *or any part* of it, shall become mortgaged, but if *the property* shall, etc.

In terms, the condition has reference to an incumbrance upon *all* the property; and applying the strict construction required by the rule, it would seem quite clear, that had the company desired to assert a forfeiture because of an incumbrance upon a part, it should have used such language as to leave no doubt.

Many authorities are cited by appellant which seem to hold that the contract of insurance is entire and indivisible, and where its conditions are violated by the insured as to part of the property the whole contract is vitiated. The value and force of these cases as precedent will, of course, depend greatly upon the peculiar provision of the policies involved, as well as the reasoning of the court.

It appears, however, that the current of decision is not uniform or harmonious. It seems to be conceded by counsel for appellant that where the insurance is placed separately, that is, a specific sum upon each article, and especially so where a specific rate is paid upon each, the policy would be avoided only as to the articles mortgaged.

A ruling to this effect will be found in *Com. Ins. Co. v. Spankneble*, 52 Ill. 53, where a part of the insured property so specifically mentioned in the policy was sold, contrary to the conditions of the policy.

Similar adjudications frequently appear in the books. In some of them, separate items of property, in others undivided interests, were alienated. In Sec. 278 of *Bliss on Insurance*, the author commenting upon such cases, remarks:

“Nor upon principle does it seem to be of any consequence

whether the valuation be separate and distinct or not. Surely a merchant who insures his store and stock in trade or a farmer who insures his barn and contents may recover for the unsold balance of his stock, notwithstanding he daily sells a portion of it. The diminution of insurable interest coincides with a diminution of the right to claim for loss, and relatively there is no change in the situation. To say that the policy is thereby *pro tanto* avoided, is not so correct an expression as to say that the amount which the assured would have the right to recover under it is *pro tanto* reduced.

“Nor will the result be different though it be stipulated that the policy is to be void upon a sale of the whole or any part of the property insured. Nothing short of a sale of the whole will deprive the insured of his right to recover at all,” *et seq.* In principle the effect of a sale should be the same as of a mortgage or mere incumbrance of any sort.

Considering the conflict of authority in other States, and as we have been referred to no ruling upon the question by the Supreme Court of this State, we must adopt such view as seems most consistent with reason and best calculated to promote justice in controversies between insurer and insured. The modern tendency of adjudication is in the direction of greater strictness in construing conditions under which forfeitures are set up by the companies and of applying with greater freedom the equitable doctrines of waiver and estoppel.

This tendency has been induced largely by the modern methods of the insurance business, whereby the agents of the companies solicit risks and in order to obtain them make representations and assurances calculated to mislead and to produce a want of care and scrutiny in reference to the language used in applications and policies. Bliss on Ins., Sec. 499; Union Mut. Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 322.

Since the object of an insurance contract is indemnity, no rule is better established than that in all cases the policy is to be most liberally construed in favor of the assured. The spirit of the rule is that where two interpretations equally fair may be given, that which promotes the greater indem-

City of Pana v. Humphreys.

nity shall prevail, and as the condition is always in language chosen by the company, it should not complain. Bliss on Ins., Secs. 174-5, *et seq.*

Upon the point here involved we are inclined to hold that as the condition is in terms against a mortgage or incumbrance of "the property" mentioned in the policy, it is not wholly broken by a mortgage of a part of the property, consisting of separate articles and capable of specific valuation, and that in such case the insurance would be vitiated as to the part so mortgaged only.

It is urged by counsel for appellant that there are suspicious circumstances connected with the loss which should be taken into account, and that this consideration justifies the company in its insistence upon all the conditions of the policy.

If there was fraud on the part of the insured he should be made to suffer the just consequences thereof.

Doubtless, this matter was pressed upon the jury as fully as the evidence warranted, and by the verdict they found there was nothing substantial in the suggestion; nor do we find anything so unusual or peculiar as to require special notice. The action of the court in giving and refusing instructions was consistent with the views above announced.

We are disposed to hold that the judgment is responsive to the merits, and finding no important error in the record it will be affirmed.

Judgment affirmed.

39	641
106	80

THE CITY OF PANA

v.

E. A. HUMPHREYS.

Practice—Default.

A defendant should not be defaulted where pleas on his behalf are on file and undisposed of.

[Opinion filed June 12, 1891.]

IN ERROR to the County Court of Christian County; the Hon. V. E. Foy, Judge, presiding.

Messrs. GROSS & BROADWELL and J. C. QUIGG, for plaintiff in error.

Mr. E. A. HUMPHREY, *pro se*.

Per Curiam. A declaration in assumpsit on the common counts was filed against the city, on the 30th of September, 1887. After several continuances by agreement, on December 10, 1887, plaintiff obtained the leave of court to file special counts, but it does not appear that any were filed. The record shows that on April 18, 1889, formal pleas of non-assumpsit and set-off were filed on behalf of the defendant. While these remained unanswered and undisposed of, on June 10, 1889, the court entered judgment by default against it, and assessed the plaintiff's damages at \$600. That this was error is well settled. *Mason v. Abbott*, 83 Ill. 445; *Sammis v. Clark*, 17 Ill. 398; *Parrott v. Goss*, 17 Ill. App. 110.

Reversed and remanded.

THE LITCHFIELD CAR & MACHINE COMPANY

V.

J. MILTON ROMINE, ADMINISTRATOR.

Master and Servant—Negligence of Master—Personal Injuries—Assumption of Risk—Evidence—Instructions.

In an action by an administrator to recover for a personal injury alleged to have been occasioned by a master's negligence, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Montgomery County; the Hon. J. J. PHILLIPS, Judge, presiding.

Ward v. Redden.

Messrs. McWILLIAMS & SON and JAMES M. TRUITT, for appellant.

Messrs. LANE & COOPER, for appellee.

WALL, J. We have examined the evidence very carefully and find it quite uncertain whether the alleged "sag" in the pipe, which is supposed to have caused the injury, was there when the pipe was first put in place, or whether it was produced afterward; it may have been the one way or the other; but in either case, as the deceased helped and took an active part in putting up the pipe, and as he ran the engine constantly from that time up to the accident, a period of some two years, there is much reason to say that he was chargeable with notice of it and should have called the attention of the employer to it if he considered it unsafe.

No one had a better opportunity than he to know how it was and if he knew and made no complaint he assumed whatever of hazard and risk it involved. It was, therefore, error to give the fourth instruction asked by plaintiff, which must have had a controlling effect upon the jury, and for the same reason it was error to refuse the nineteenth and twentieth asked by defendant. The judgment will be reversed and the cause remanded.

Reversed and remanded.

WILLIAM H. WARD

V.

WILLIAM REDDEN.

Principal and Surety—Action to Recover Amount Paid by Surety—Limitations—New Promise.

In an action brought to recover a sum of money paid by plaintiff as surety upon a promissory note for defendant, this court holds that the evidence fails to establish a new promise, the defense being the statute of limitations, and that the judgment for the plaintiff can not stand.

[Opinion filed June 12, 1891.]

IN ERROR to the Circuit Court of Cumberland County; the Hon. W. C. JONES, Judge, presiding.

Mr. W. S. EVERHART, for plaintiff in error.

Mr. PETER A. BRADY, for defendant in error.

WALL, J. This was an action of assumpsit to recover a sum of money paid by plaintiff as surety on a promissory note for defendant.

The statute of limitations, five years, was interposed as a defense, to which the plaintiff replied that the defendant had promised anew within five years.

The verdict was for the plaintiff for \$160, and judgment was rendered accordingly.

We have carefully examined the evidence and are of opinion that it wholly fails to establish a new promise. Applying the rule as laid down in this State, we think the judgment should have been for defendant. *Keener v. Crull*, 19 Ill. 191; *Carroll v. Forsyth*, 69 Ill. 127; *Wachter v. Albee*, 80 Ill. 47; *Haywood v. Gunn*, 4 Ill. App. 161.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

MAMIE FOVAL

v.

JESSE FOVAL.

Divorce—Adultery—Evidence.

1. It is for the jury in a given case to determine the weight and effect of the joint occupancy of one room by an unmarried couple.

2. Upon a bill filed by a husband for a divorce, adultery upon the part of the defendant being alleged, she filing a cross-bill setting up adultery, cruelty and drunkenness upon his part, this court holds that cer-

Foval v. Foval.

tain evidence tending to show adultery of the defendant after the filing of such bill, was improperly received; that certain instructions given were erroneous, and that the decree for the complainant can not stand.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Calhoun County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. F. M. GREATHOUSE and T. J. SELBY, for appellant.

Messrs. E. A. PINERO, J. R. WARD and H. C. WITHERS, for appellee.

PLEASANTS, J. The bill herein was filed by appellee January 16, 1890, alleging the intermarriage of the parties about the 30th of October, 1889, their cohabitation until November 25, 1889, appellant's desertion of him on that day and subsequent commission of adultery with one Isaac Foval and others to the complainant unknown, and praying a divorce.

Her answer admitted that she married, lived with and left him as alleged, but denied the charge of adultery. She filed a cross-bill also, on April 10, 1890, averring that his drunkenness, brutality and threats of violence against her during the brief period of their cohabitation, justified her leaving him as she did; that he never promised to change his habits or conduct toward her, nor offered to take her back or provide for her; and that soon after she left him, he went to St. Louis and procured a woman of disreputable character, pretendedly for his housekeeper, occupied the same room with her at a hotel in that city for two days, there committed adultery with her and now has her living with him at his home. His answer thereto denied the allegation of misconduct on his part during the cohabitation and adultery afterward. Replications having been filed, the court directed the issue to be submitted to the jury, namely, whether she or he or both had committed adultery after the marriage as charged in the bill and cross-bill respectively. These issues they found for the appellee, and a decree in his favor for divorce was accordingly entered.

It was shown on the trial that at the time of the marriage appellee was seventy-two years of age, living on his farm in Calhoun County, with his three children, one of whom, the youngest, not yet three years old, was by his second wife, who died August 14, 1889.

Isaac Foval was his nephew, residing in St. Louis, where he was carrying on an express, drayage and message business. He was about thirty-five years of age and had been divorced from his wife in 1886; a son of thirteen and a daughter of ten years of age were living with him. Appellant, then about twenty-two years of age, was his housekeeper and clerk, as she had been for four years.

The parties first met at Isaac Foval's house, where appellee and his wife were on a visit in the preceding summer. On his invitation, Isaac with his children and appellant returned this visit in the latter part of August, in ignorance of the death of Mrs. Foval, which had so recently occurred. Isaac stayed only a day or two, but the children remained longer, and appellant, at appellee's request, still longer, in all about six weeks, taking care of his children. During that time, she says, he repeatedly proposed marriage to her, which she refused. But a few days after she left he followed her to St. Louis, and after a few days married her.

The evidence relied on as proof of the adultery charged in the original bill was the testimony of one Herman Boekmer, a blacksmith of St. Louis, who had been for some time employed by Isaac Foval to shoe his horses. He testified that he had met appellant at Isaac's house some time in 1889, and had seen her with him in his buggy going to and from his house and office; that about the 6th of March, 1890, she sent word to him (the witness) that she wanted to have a private talk with him, and, pursuant to appointment, at ten o'clock in the forenoon of that day, met him at the corner of Third and Morgan streets, whence he took her to a wholly unfurnished room in the rear of a saloon on the corner of Fifth and Carr streets, without the consent or knowledge of the proprietor or of anybody else, and there remained with her about four hours, without a table, bed, lounge or chair, or anything to

Foval v. Foval.

sit or lie upon, but the naked floor; that there they drank beer and had sexual intercourse; that on that occasion she asked him if Isaac Foval visited fast houses, and upon his telling her that he held his horse while he (Isaac) went into one, she got mad and said that from that time she would have nothing more to do with him; that though she and Maude, his daughter, had slept together, the sport went on just the same, but that she was now going to drop him. He further testified that he never had sexual intercourse with her before that time.

It will be observed that according to the witness the act here referred to was committed nearly two months after the original bill was filed. It therefore could not have been within the allegations of the bill. It formed no part of the case made by it. Appellant was not called upon to anticipate and meet this evidence of it. In our opinion it should not have been allowed to go to the jury. Assuming that the word "sport" in the statement attributed to her meant sexual intercourse, and that the time referred to was subsequent to the marriage, this alleged admission was only legitimate evidence in the case tending to prove the charge of adultery as made against her. To say nothing of the infirmities inherent to this kind of evidence, the character of the witness as depicted by himself, and of the story he told, and the manner in which he came to be a witness in the case, in connection with Lucas, are all circumstances worthy of serious consideration as touching his credibility.

He was wholly uncorroborated. Nothing was shown in the previous conduct of appellant that would prepare one's mind to believe his story against her. She denied it. She also denied that she ever had sexual intercourse with Isaac Foval. Isaac also denied that charge. And there were some circumstances tending to corroborate them.

Upon this state of the evidence the court instructed the jury as follows: "If you believe from the evidence in this case that Mamie Foval and Isaac Foval or Mamie Foval and Herman Boekmer had sexual intercourse with each other since the date of the marriage of Jesse Foval to Mamie Foval,

and before this suit was instituted, then the verdict should be as to that issue as follows: We, the jury, find that Mamie Foval did commit adultery since her marriage with Jesse Foval, as charged in the bill for divorce."

There was not a particle of evidence on which to base the hypothesis of adultery with Boekmer "before this suit was instituted." Boekmer himself distinctly stated that he never had sexual intercourse with appellant before March 6, 1890. We think the insertion of this hypothesis, and the evidence of adultery with Boekmer, were improper and well calculated to prejudice the case of appellant.

In support of the cross-bill it was abundantly shown that during the brief period of cohabitation of these parties, appellee was almost constantly drunk, and grossly abusive in word and act toward appellant, and that she was uniformly kind and dutiful toward him and his children. It was not until he had kicked her out of bed, had threatened, without provocation and in the presence of others, to throw her out of the wagon and break her neck, to skin her and make whip crackers of her hide, that she took advantage of his absence from home to leave him and return to St. Louis.

The night clerk of the Hotel Western, St. Louis, testified that appellee, with his little boy and a woman named Georgie Thompson *alias* Georgie Brown, occupied the same room in that hotel, containing but one bed and a lounge, two nights, January 9th and 10th, 1890, and that when he showed them to it he asked appellee if the woman was his wife and he said she was. From there they went to his home in Calhoun county, Illinois, where they slept in the same room, containing but one bed, for three weeks, and until there was talk in the neighborhood about whitecapping them. There was also evidence clearly tending to show that this woman's general reputation as to chastity was bad. That they roomed together as above stated, they both admitted, but they both denied that they occupied the same bed together or had sexual intercourse, and gave as a reason for occupying the same room that the child was strange to her and cried for his father.

In reference to the evidence the court gave the following

instruction: "The court further instructs the jury that unless the defendant, Mamie Foval, has shown by a preponderance of all the evidence, that the joint occupancy of such room by Jesse Foval and Georgie Thompson was for a criminal purpose, and that Jesse Foval did commit the adultery charged in the cross-bill, the jury shall find for the complainant, Jesse Foval, as to that issue."

We apprehend that this instruction may have misled the jury to suppose they could not properly find the fact of adultery from such joint occupancy of a room as was here shown, but that this must be supplemented by further proof of the purpose and act of the parties. It was for the jury to determine the weight and effect of such joint occupancy. That fact, of itself, had some tendency to prove the purpose, and the jury were authorized by the law to determine how strongly it so tended and whether it was or was not overcome by the other evidence. 2 Greenl. on Evidence, Sec. 46 *et seq.*

Thus the probable effect of the two instructions was to improperly strengthen the evidence against appellant and weaken that in her favor. We think she ought to have another trial.

Reversed and remanded.

39 648/
140 614/

THE LAKE ERIE & WESTERN RAILROAD COMPANY
V.
JOHN B. WILLS.

Railroads—Negligence of—Crossing—Personal Injuries—Contributory Negligence—Duty to Look and Listen—Practice.

1. The formal *ad damnum* appearing at the end of a given count applies to all the counts that precede it.

2. It is proper in personal injury cases to ask a physician, testifying as an expert, whether certain injuries are permanent or not, and whether the same are of a class that are necessarily painful.

3. It is as much the duty of a hand car crew upon approaching, with their car, a street crossing, the greater part of which is occupied by a stand-

ing train, to use such care as will prevent injury to themselves, as others approaching the same, having equal rights.

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of McLean County; the Hon. OWEN T. REEVES, Judge, presiding.

Messrs. W. E. HACKEDORN and A. E. DEMANGE, for appellant.

Mr. THOMAS F. TIPTON, for appellee.

PLEASANTS, J. This was an action on the case for injury to the person and property of appellee by collision of appellant's hand car with his wagon, on its track, at the crossing of Grand street, in the village of Saybrook. Verdict and judgment for \$4,500.

Grand street runs east and west, and is fifty feet in width. The railroad crosses it diagonally, northwest and southeast, with a main track and a switch or side track about seven feet apart, the easterly one being the switch. On July 18, 1889, appellee with his wagon and team was hauling sand over this crossing. On the occasion in question, he came from the east to appellant's right of way on the next parallel street south, and thence up, on the east side of the tracks, to Grand. A train of five freight cars, extending from the street northwest, stood on the switch, one car, and at least ten feet of another, being within the street and occupying a considerable part of the sixteen foot planking laid in the center for crossing the tracks. To avail himself of this planking he was obliged to drive close to the car. The ground at the street south was considerably below the tracks, rising to grade at Grand. At the further end of this line of the cars was the cattle chute and stock yards, and beyond them a cut.

By reason of these conditions appellee could not see up the main track until he passed or nearly passed the freight car, when his horses would be about on it, or just going upon it. As he reached Grand street and was turning west to make

the crossing he heard the whistle of a freight train approaching from the northwest. Thereupon he stopped, stood up, and looking over the cars on the switch saw the smoke and stack of the coming locomotive. The train was then so far away that he could go on without danger from it; but the more certainly to avoid it, "slapped up" his horses to hurry them, and when he was just over the switch and they about stepping on the main track, was first able to see the hand car, coming from the same direction and then within a few feet of his team. Having but an instant to choose between an attempt to back and going on, he "yelled to his horses and they sprang forward," but it struck his front wheel, breaking it and the single-trees and throwing him out on his arm and head.

The men on the hand car, at some distance up the road, had heard the noise of the freight train before it whistled, and determined to run down to a point a little below that at which the collision occurred and there take the car off to let the freight pass. There is some conflict in the testimony as to the rate of speed at which they were running. They say from four to five miles an hour, while other witnesses thought they were going as fast as they could. They further say they could have stopped in twenty-five feet; that they did not see the team until just as they struck it, and could not, because of the freight car in the street, until it was too late for them to avoid the collision. John Nelson, Jr. testified: "I believe we could have seen a man coming in time to have stopped the car before it struck the wagon, if the car hadn't been there;" and, "I don't think we could have stopped the car if we had seen Mr. Wills' team coming from behind the freight car." "I don't think we could have seen plaintiff's team ten or twelve feet before he got on the main track." Peter Pierson said: "We were not far enough back when we could have seen him, to have stopped the car."

To those who did not see it there was no notice of the coming of the hand car except the noise it made. Appellee did not hear that. A witness who was two and a half blocks west of the track, says he heard it. But he had some advan-

tage of appellee with reference to it. He saw it coming and his attention was drawn directly to it by the sight. He was on foot and not in a rumbling two-horse wagon. The wind may have favored him. It does not appear that there was anything between him and it, to obstruct or divert the sound.

The freight car on the street had been left there as it then was, since the morning before. Appellee had hauled sand over that crossing all of the previous day and knew its condition and surroundings. On the occasion in question he was cut off from sight and hearing of the hand car by intervening objects. He was in charge of his team, giving it his attention. Its movement may have made nearly or quite as much noise as did that of the hand car. Until he heard the whistle of the freight train he had no reason to suppose there was a locomotive within five miles of the crossing, nor does it appear that any other was. He says: "I thought all I had to look out for was the locomotive I heard." He did look out for that. He knew that "considerable switching was done on the side and main track at Saybrook," and "saw hand cars going sometimes;" but on this occasion he "didn't think about the hand car."

This is the whole case on the evidence, from which it is sufficiently clear that appellee's injury was not the result of a pure accident. Either he or the defendant's servants, or both, should be held responsible for it, and to determine which was the office of the jury. What did appellee do that reasonable care for his own safety forbade, or what omit that it required him to do?

It is idle to suggest that he was careless with reference to the coming train. That was half a mile, and he but about twenty feet from the crossing, when he started up to make it. When it reached the crossing the hand car, wreck and victim had been removed. There was ample time to cross ahead of it without hurrying, and yet he was careful enough to hurry.

But it is said he should have taken the precaution to ascertain, by looking and listening, that the track in the immediate vicinity was clear; in other words, that no hand car was coming and dangerously near; that the car in the street, obstruct-

ing his view of the main track from his wagon, made the situation unusually dangerous and required a proportionate degree of care on his part. That is a general rule of law and reason. It may have much force where the party asking the benefit of it is not in fault for the existence of the unusual danger. But here appellant's servants placed the car in the street and left it there wrongfully. If, as between these parties, its presence required unusual care in making the crossing, the jury may have thought the defendant's servants were under the greater obligation to stop the hand car to hear, and to get out to see whether a team was approaching on Grand street, or at least so reduce their speed before passing the freight car as to be able to stop without colliding. They had no more right to make the crossing than had the plaintiff, and were as much bound to use care for the safety of themselves as others having the same right, in making it.

This place was outside of the village settlement, though within its platted bounds. There were but these two railroad tracks. It was not shown that any other car was there besides the five referred to, until the hand car appeared. No switching was being done. No locomotive was there to do it. No train was coming, near enough to forbid plaintiff's attempt to cross, and none would come without due warning to him. He could not see the hand car from his wagon at any point of his way until he passed the end of the freight, and did not hear it. He did not think of it.

Was that a lack of ordinary care for his own safety? Would reasonably cautious men, under like circumstances, no other danger appearing or existing, look for, listen for, or think of a hand car? This is a matter of opinion and judgment, and although different minds might differ about it, we see no sufficient reason for overruling the conclusion of the jury. We also are inclined to think that unless there was some circumstance positively calling attention to it, the subject of hand cars as a source of danger would have occurred to the minds of a very few, at most, out of many persons in the position of the plaintiff. The statute and ordinances do not require any notice of their movement, nor prescribe any limit

to their rate of speed. Properly managed they are not dangerous, in fact, without such notice, nor generally so regarded.

It is said that he might and should have stopped, when he did see it. The evidence tends to show that to avoid it he would have had to back also. His horses had just been slapped up, had the rein, and were hurrying. If not already on the track, their heads must have been over it before they could be stopped. Was it practicable to back out in time? And if so, was it advisable? What would have been the effect on the team of the rushing car so close to their heads, and how would it have been left with reference to the freight train so soon to pass? Appellee had every motive to pursue the course that appeared to him to be the safest. The situation did not admit of deliberation, and if that was not due to his fault, error in judgment should not be attributed to carelessness. He doubtless did the best he could to judge rightly.

The following special interrogatory was submitted to the jury: "Did plaintiff exercise ordinary care and prudence for his own safety in attempting to pass over the crossing, and in the manner shown by the evidence?" Their answer was, "Yes." We think this was supported by the proof, and must be held conclusive.

Their warrant for finding the defendant guilty of negligence has already been indicated. No excuse appears for its leaving the freight car on the street as it did, and the effect of that fault is shown by its own witnesses. In view of that, the jury could well find also that the manner of running the hand car was wrongfully negligent.

The declaration is in four counts, of which the first charges, generally, that the defendant's servants carelessly drove the hand car; the second specifies the leaving of the freight cars where they were on the side track, as the act of negligence which was the cause of the injury; the third avers that the defendant's servants were driving a hand car on said railroad toward said crossing and gave no notice to plaintiff of their approach, and so negligently drove said hand car that it struck his wagon, throwing him out and thereby injuring him; and the fourth, that defendant with force and arms

assaulted plaintiff and with a hand car struck his wagon, etc.

The formal *ad damnum*, which is in \$5,000, appears at the end of the third count, and nowhere else in the declaration. It is said that therefore the plaintiff could recover under that count only; and in this case, not under that; because there was no evidence that the defendant was possessed of, or operating the railroad or the hand car, or that the men running it were the defendant's servants, as therein averred.

We know of no such rule of pleading as that here stated. Perhaps the fourth count was obnoxious to a special demurrer. That count was evidently added after the declaration had been completed, and is of no importance. The *ad damnum* applies to all the counts that precede it. *Burst v. Wayne*, 13 Ill. 599. It is neither necessary nor customary to put it in each.

The relation of the defendant to the railroad, as possessor and operator, and to the men in charge of the hand car, as master, was not a real issue in the case. That was assumed and conceded, and the case tried on that theory by both parties. Thus the first instruction asked by the defendant and given, was, "That the *fact* that one of *defendant's* freight cars *was* standing on the side track * * * *did* not relieve the plaintiff from exercising ordinary care," etc. The fifth was, "That the railroad company had a lawful right to have its stock pens and cattle chute on the line of its right of way between Grand street crossing and the river * * * and any number of cars standing on its switch or side track outside of the line of intersecting streets," etc. The first modified instruction for defendant was, "That the defendant had a right to have a hand car on the track of its railroad," etc., and the modification did not affect that statement. The omission of positive formal proof on this point was not suggested before the verdict was rendered. If it had been, the court would have allowed it to be supplied. This objection comes too late, and with too little merit in itself.

Dr. Winter was asked to "state whether, in a man of his age, those injuries are permanent or not," and "were the injuries he received of a class that were necessarily painful?"

Counsel think the questions were leading. We do not. It was discretionary with the court to allow or refuse to allow defendant to impeach its own witness, Greene. The affidavit relating to him, and the paper he is said to have signed, are not in the abstract.

No material error is perceived in giving, modifying or refusing instructions. In the clause in the ninth, given for plaintiff—"but also *an* impairment of the plaintiff's general health, which is shown by the evidence," the context shows the word "an" was intended to be "any," and it was doubtless so understood. We do not approve it as corrected, but have no idea that it did any harm.

It is, of course, difficult to estimate the damages to plaintiff. He suffered from concussion of the brain, making him delirious most of the time for ten days. One bone of his wrist was broken and the other dislocated. The arm was kept in splints six weeks, and is seriously and permanently crippled. He was almost entirely deprived of the sight of one eye by traumatic cataract. His neck, shoulders and body were badly bruised and perhaps there was serious internal injury. He suffered great pain—continuing to the time of trial. He has not been able to do any work since the injuries were received. The damages allowed may seem to be large. We are not as able to judge of that as was the Circuit Court and jury. On the whole we see no sufficient reason for interfering with their judgment.

Judgment affirmed.

JAMES M. BRIDGES

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Criminal Law—Act Concerning Propagation and Cultivation of Fishes—Use of Seine.

A pond that is private property is not included within the terms of the statute prohibiting the catching of fish with seines or similar devices in "water-courses wholly within or running through the State of Illinois."

[Opinion filed June 12, 1891.]

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. PALMER & SHUTT, for appellant.

Messrs. JOHN C. MATHIS, E. S. SMITH and A. J. LESTER, for appellee.

CONGER, P. J. This was a prosecution against appellant to recover the penalty imposed by the act entitled: "An act to encourage the propagation and cultivation, and to secure the protection of fishes in the waters of this State," as amended by act of June 3, 1889, Session Laws of 1889, page 159. The sixth section of said act is as follows:

"That it shall be unlawful for any person to catch or kill any fish with any seine or any other device used as a seine, in or upon any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous or other water-courses wholly within or running through the State of Illinois. * * * Any person so offending shall be deemed guilty of a misdemeanor, and fined as provided in this act." The case was commenced before a justice and appealed to the Circuit Court, where it was tried by the court without a jury upon the following agreed state of facts.

Jacob Miller is the owner of the northwest quarter of section eight in township fifteen north, range three, west of the third principal meridian, in Sangamon county, Illinois, in which what is known as Sand Prairie Lake is situate.

The small body of water known as Sand Prairie Lake is about one-quarter of a mile in length, and its width ranges from about twenty-five yards to one hundred yards.

It is situate in the bottom of the north fork of the Sangamon river and is distant from said river only a few yards at the farthest point. There is a low place or depression in said northwest quarter of section eight, reaching from the north end of said lake or pond, to the bed of said river, at most

seasons of the year; but in case of high water this depression or slough fills with water and connects directly the waters of this pond or lake with the waters of said stream or river, and at times this connection lasts for a period of several days or weeks. The rises in the said river or stream generally occur in the spring of the year or the early summer, and again in the fall. When there is no high water in the said river or stream, the said lake or pond is entirely shut in, and its waters do not mingle at all with the waters of said stream.

In July of 1889 the defendant, James Bridges, obtained the consent of said Jacob Miller to fish with a seine in said body of water, so situate on his premises, and to catch and kill fish in said pond with a seine.

After consent was given defendant by Jacob Miller so to do, the defendant with the help of others went in and upon said pond, and with a large seine, with meshes of one and one-half inches and about seventy-five yards long—not a minnow seine—dragged said pond or body of water, and caught and killed thereby a large number of fish of different kinds, of the varieties common to the waters within the State of Illinois.

The north fork of the Sangamon river is not a stream or river used for navigation, nor is the said pond navigable or used for navigation. Upon the foregoing facts the court fined appellant \$10 and costs, and he appeals.

“By the common law a right to take fish belongs so essentially to the right of soil in streams or bodies of water, where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of the stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishing is sole and exclusive, unless restricted by some local law or well established usage of the State where the premises may be situate.” *Beckman et al. v. Kreamer et al.*, 43 Ill. 447, and authorities there cited.

Without questioning the power of the Legislature to

regulate the manner of taking fish in all public waters of the State, and without noticing the further question of how far such regulation could lawfully extend to private or individual waters, the only question we are required to decide in the present case is, does a proper interpretation of the law of 1889 above quoted include within its terms the pond in question, under the facts as they are stated in the agreement. We are clearly of the opinion that it does not.

It is insisted by counsel for appellant that the words "or other water-courses," limit the meaning of the preceding words, so that no pond, lake, slough or bayou would be within the act, unless such places came within the definition of water courses, that is, a stream usually flowing in a particular direction in a definite channel having a bed, sides or banks, etc. We are not prepared to assent to this proposition.

We think there might be bodies of water denominated as ponds, lakes, sloughs or bayous of such magnitude, and with such connection with the rivers or streams of the State as to come within the provisions of the law. The rule for determining this question would seem to be: Is the body of water private property; has the owner of the soil on which it is situate, the lawful right to alter, change or destroy it by drainage, filling it up, or by any other means that might suit his interest or pleasure, without regarding the wishes or interests of the general public or third persons? If so, then it is private property and is not included within the spirit and meaning of the law.

No one can exercise such control over the smallest creek or rivulet in the State. He must not permanently change its course, or injure its waters, but must allow them to flow through his premises for the benefit of others.

There might also be ponds, lakes, sloughs or bayous so situated as to become a part of the public waters of the State, so that the owners of the soil beneath them could not lawfully interfere with their use by the public, and in such cases, we think, the statute would apply.

Counsel for appellees in their brief, say: "We do not dis-

pute Miller's right to prevent the entrance or escape of fish into or from this lake at pleasure. We do not deny that he might fill the lake if he chose, and in that way destroy the fish."

No one, we presume, would deny this right to Miller, under the facts as stated, and the conclusion to our minds follows, that he could have no such right in any water wherein the public have rights, or over which they propose to exercise jurisdiction or control in the manner of taking fish.

The judgment of the Circuit Court will be reversed.

Judgment reversed.

INDEX.

ACCOUNT.

1. This court declines, in view of the evidence, to interfere with a decree for the defendant upon a bill filed for an accounting. *Wilson v. Douce*, 127
2. In an action to recover a balance alleged to be due upon an account, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Osborne & Co. v. Meyerott*, 425

ADMINISTRATION.

1. Before a County Court can order the sale of a decedent's land for the purpose of paying debts, it must ascertain that the personal estate left by the decedent, and which has or should come to the hands of the executor or administrator, is insufficient to pay them. *Rowland v. Swope*, 514
2. Heirs are not to be held as sureties for the faithful performance by an administrator of his duties, nor are their rights dependent upon his integrity or negligence. *Id.*, 514
3. The real estate of a deceased person should not be ordered sold by the County Court for the payment of debts, where it appears there has been a sufficiency of personal assets to pay the same, but that they have been wasted by the administrator or executor, and never applied to such payment. *Id.*, 514

AGENCY—See INSURANCE, 5, 8, 22, 23.

1. In an action brought by commission merchants to recover a balance alleged to be due from defendant and another, this court holds that said persons were individually liable therefor; that a certain amendment of the declaration was proper, though made after verdict; and declines to interfere with the judgment for the plaintiffs. *Metz v. Wood*, 131

AMENDMENTS—See AGENCY, 1; HUSBAND AND WIFE.

APPEAL AND ERROR—See PRACTICE.

1. Upon appeal from the finding of a jury in a case tried before a justice, he failing to enter a formal judgment therein, the successful party may for such reason require a dismissal of the appeal, but a motion to dismiss the suit amounts to admitting jurisdiction as having been obtained by the appeal, and where the case is of such a kind that the court below had original jurisdiction, and to which such party

APPEAL AND ERROR. *Continued.*

could submit his person without process, he should not, having done so, be allowed to question the jurisdiction thereof. *Northrup v. Smothers*, 588

ARREST—See TRESPASS, 3.

ATTACHMENT—See REPLEVIN, 1.

ATTORNEY AND CLIENT.

1. In an action brought by attorneys to recover from a municipality for fees earned and disbursements made in certain suits, this court declines, in view of the evidence, to interfere with the verdict for the plaintiffs. *Town of Sheldon v. Burry*, 154

2. This court declines, in view of the evidence, to interfere with the judgment for the plaintiff in an action brought by an attorney to recover fees for services rendered. *Timmerman v. Pusey*, 523

BANKS—See INTEREST, 1.

BASTARDY.

1. In a prosecution for bastardy, where the evidence was conflicting, it is *held* that the verdict was sufficiently supported by the evidence. *Common v. People of State of Illinois*, 31

2. Evidence to show that the prosecuting witness testified differently upon a former trial is competent in such cases, but where it appears that the exclusion of such testimony probably did the defendant no harm, the discrepancy attempted to be shown being immaterial, the court may refuse to reverse the judgment. *Id.*, 31

3. At common law the father of a bastard child was under no obligation to support the same. The liability is statutory, and exists only when the mother is an unmarried woman. *Vetten v. Wallace*, 350

4. The presumption is, that a child born in wedlock is legitimate, and this presumption the mother will not be heard to deny. *Id.*, 390

5. Where, in an action by a married woman to recover for the support of an alleged bastard child, from the father thereof, the defendant shows by his plea that the plaintiff was the mother of the same, and had at the time of its birth a husband, such plea effectually meets an allegation in the declaration that defendant was the father. *Id.*, 390

BILLS OF EXCEPTIONS—See PRACTICE, 7, 8, 9, 26, 27, 48, 49.

1. A recital in the judgment, by the clerk, that a motion was made for a new trial, is a nullity. The fact that such motion was made must appear in the bill of exceptions signed by the judge. *Burnett v. Snapp*, 237

BRIDGES—See HIGHWAYS, 6.

CONSTABLES.

1. In an action brought to recover from the defendant for aiding a constable in wrongfully removing personal property of the plaintiff, the same never having been returned, this court declines, in view of the evidence, to interfere with the judgment in his behalf. *Wilbur v. Turner*, 526

CONTEMPT.

1. In proceedings against a clerk of court for contempt, he having failed to obey an order thereof touching one of his official duties, it must be shown to convict him that he wilfully intended to disobey or obstruct the same. *Dines v. The People*, 565
2. It will not necessarily be presumed in such case that the clerk knew the contents of such order when he filed the same. *Id.*, 565
3. A court can only take judicial notice of such acts and proceedings as will properly go upon the record, and the knowledge, opinion or recollection of the judge in such case, that the clerk did know the contents of the order, is his personal and not his judicial knowledge. *Id.*, 565

CONTRACTS.

1. A contract, made and payable in trade, without time or place for payment, is payable on demand or within a reasonable time, and at the residence or place of business of the promisor, and before the promisee is entitled to a money judgment against the promisor for non-performance, he must show a demand on his part and a refusal on the part of the promisor. *Schriner v. Peters*, 309
2. The doing or consequence of an unlawful act can not be made the consideration of a contract. *Vetten v. Wallace*, 390
3. Where, under a contract to do a certain thing, the contractor is bound to make certain tests, and is prevented from doing so by the contractee, he will be excused from the performance of such requirement. *Wilderman v. Pitts*, 416
4. In an action brought to recover upon a contract to dig a well, this court holds that the jury were justified in finding that the well, when finished, was of the capacity, and would furnish the supply of water required by the terms of said contract; that the evidence established the fact that the plaintiff was prevented by the defendants from testing the well after it was finished, and declines to interfere with the verdict for the plaintiff, although the same is for less than the contract price. *Id.*, 416
5. In an action brought to recover upon a contract touching the use of a certain boat, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Robinson Floating Museum Co. v. Hauptmann*, 441
6. A person may prove the existence of a separate oral agreement as to matters upon which a written contract is silent, and which is not inconsistent therewith, if it can be inferred that the parties did not intend the writing to be a complete and final statement of a given transaction, and this rule applies to parol agreements as to how a written contract is to be performed. *Razor v. Razor*, 527
7. In an action brought by a married woman upon a written contract, executed by her husband, and certain parol provisions not contained therein, the substance being an agreement upon the part of the husband, in consideration of the wife signing a deed of conveyance of their home, to invest in her name the proceeds of the sale thereof in

CONTRACTS. *Continued.*

another house in a different place, this court holds that the plaintiff's existing interest in the property being sold by her, formed the consideration for the undertaking upon the part of the defendant to furnish the other house; that it was a good and sufficient consideration to support the agreement; and declines to interfere with the judgment for the plaintiff. *Id.*, 527

8. Where no time is fixed, the law will imply that material for a given purpose is to be furnished within a reasonable time, which will vary with circumstances. *Truesdale Mfg. Co. v. Hoyle*, 532

9. Where a person so agreeing to furnish, knows that the purchaser is required to complete a given contract within a certain time, he contracts with this fact in view, and takes the risk of delay arising from the pressure of other engagements and from possible failure to obtain certain articles necessary to enable him to so furnish. *Id.*, 532

10. It is proper in an action instituted to recover an amount alleged to be due from a contractor, where the latter contends that he has been injured through delay in furnishing the goods in question, to allow such contractor to show that certain subcontractors have collected from him by suit damages for delays caused them in the performance of their contracts; such judgments are not conclusive as against those who were not parties to it, but they tend to show the damage as claimed by such contractor. *Id.*, 532

CRIMINAL LAW—See MUNICIPAL CORPORATIONS, 22.

1. Where a pharmacist entitled to registration pays his fee, he is entitled to proceed in his business until the expiration of the year, and he can not be held liable in a criminal prosecution because of the non-action of the board of pharmacy. *Id.*, 506

DAMAGES—See CONTRACTS, 10; HIGHWAYS, 1; NEGLIGENCE, 4.

1. Punitive damages are admissible where the injury is wantonly inflicted, and are visited upon the wrongdoer by way of mere punishment, regardless of the amount of damages actually sustained. *L. E. & W. Railroad v. Christison*, 495

2. The indignity suffered by reason of the unlawful act of another is a proper subject of compensation, whether the act was wanton, malicious or wilful, or whether it was merely negligent or mistaken. *Id.*, 495

3. What the indignity is in a particular case is a question of fact for the jury. *Id.*, 495

DIVORCE.

1. It is for the jury in a given case to determine the weight and effect of the joint occupancy of one room by an unmarried couple. *Foral v. Foral*, 644

2. Upon a bill filed by a husband for a divorce, adultery upon the part of the defendant being alleged, she filing a cross-bill setting up adultery, cruelty and drunkenness upon his part, this court holds that certain evidence tending to show adultery of the defendant after the

DIVORCE. *Continued.*

filing of such bill, was improperly received; that certain instructions given were erroneous, and that the decree for the complainant can not stand. *Id.*, 644

DRAINAGE.

1. Drainage commissioners are public officers who may, in proper cases, be ousted by *quo warranto*. The Legislature has the power to alter or repeal the drainage law and may provide for the removal of one set of officers and for the appointment of another set in a different mode. *Smith v. The People*, 238

2. A drainage district is a public, involuntary, *quasi* corporation, and in the absence of special enactment is not liable for the wrongful and unlawful acts of its agents done in the execution of corporate duties and powers. *McGillis v. Willis*, 311

3. Where the drainage commissioners merely acted under the order of the County Court in letting the contract for the work complained of and had no immediate supervision of its execution, they are not personally liable for injuries resulting from the prosecution of the work. *Id.*, 311

4. In an action brought to recover damages for the overflow of plaintiff's land, resulting from the construction of a dam, where it clearly appeared that the erection of the dam was necessary to the feasible and economical prosecution of the work of the drainage district, it is *held*: That the plaintiff's claim for damages was, or might have been, passed upon in the assessment of damages in the drainage proceedings, and that the matter was *res adjudicata*. *Id.*, 311

DRAM SHOPS.

1. Where a license to sell intoxicating liquors is issued under an ordinance regular on its face, purporting to have been passed by the board of trustees of the village, and signed by the village president and duly published, such license, when accepted and paid for in good faith, is a defense against a criminal prosecution for selling liquor, although the ordinance in question was not legally passed. *Hanks v. The People*, 223

2. In an action brought by a minor by next friend, under the Dram Shop Act, to recover for alleged injuries to plaintiff's means of support by reason of defendant's sales of intoxicating liquor to plaintiff's father, thereby causing the death of plaintiff's father, *held*: 1st, that the evidence failed to show that the death of plaintiff's father was caused by the sales of liquor shown, and 2d, that the evidence did not sufficiently show that plaintiff had suffered in his means of support through the death of his father. *Westphal v. Austin*, 230

3. This court affirms, in view of the evidence, a judgment for the plaintiff, in an action brought by a widow under the Dram Shop Act, to recover from saloon keepers for injury to her means of support by reason of the death of her husband, the same being alleged to have been caused by liquor sold or given by them to him. *Campbell v. Magruder*, 604

DRAM SHOPS. *Continued.*

4. In the case presented, this court holds as proper the allowance of hypothetical questions on the basis of the undertaker's statements as to the contents of the dead man's stomach. It was for the jury to determine its weight. *Id.*, 604

EJECTMENT—See REAL PROPERTY, 1, 2.

EMINENT DOMAIN.

1. Land held for a public use can be condemned for another public use when the latter is different from the former, and not inconsistent with or destructive of, the right of the public under the first. *Davis v. Nichols*, 610

2. The public square of a village can not be appropriated as the site for a school house. *Id.*, 610

ESTOPPEL—See INSURANCE, 17; REAL PROPERTY, 1.

EVIDENCE—See BASTARDY, 2; CONTEMPT, 3; DIVORCE, 2; INSURANCE, 4; MUNICIPAL CORPORATIONS, 13; PRACTICE, 11, 33, 45.

1. Whether it was error to admit in evidence the record of the trial and acquittal of plaintiff on an indictment for malicious mischief, *quære*. *Wilmerton v. Sample*, 60

2. Proof of delivery of goods to and their shipment by a common carrier to a consignee, suitably and properly billed and directed, is just as strong and effectual *prima facie* evidence of their receipt by the consignee, even if such consignee is the agent of the consignor, as it would be if the consignee were the purchaser of such goods. *Plano Mfg. Co. v. Parmenter*, 270

3. Evidence as to directions given by a contractor as to pushing a certain work may be admitted in a given case, where the same had reference to the methods adopted as to the work in hand. *Truesdale Mfg. Co. v. Hoyle*, 532

4. Where a witness has testified in the usual way to the genuineness of a disputed signature, it is not proper upon cross-examination, to submit to him others known to be genuine for comparison with it, and a statement to the jury of the difference between them as they may appear to him. *Bevan v. Atlanta National Bank*, 577

5. The authorship of a writing may be shown by other circumstances than the likeness or unlikeness of a given handwriting to that of the alleged writer, such as a marked peculiarity in its spelling or style of composition characteristic of the alleged writer. *Id.*, 577

6. In an action brought to recover upon a promissory note, the defense being that the name of one of the alleged signers thereof, a person deceased, was a forgery, this court holds as proper the exclusion of several questions sought to be asked certain witnesses upon cross-examination, touching the difference between signatures submitted, and others, as to the ownership by them of similar notes, and declines to interfere with the judgment for the plaintiff. *Id.*, 577

7. If, upon inspecting a printed book or pamphlet of ordinances, it can be determined from any part of it that it purports to be published by proper authority, it is enough. *Village of Wapella v. Davis*, 592

EVIDENCE. *Continued.*

8. The fact that such ordinances, certified in accordance with Sec. 4 of Art. 5 of the "Cities and Villages Act" are printed copies of the originals instead of written, can make no difference as to their admissibility in evidence in a given case. *Id.*, 592

9. Upon a suit brought by a municipality to recover from defendant a penalty for failure to perform road labor on its streets, in conformity with the requirements of one of its ordinances, this court holds as erroneous the exclusion of the book of ordinances thereon offered in evidence by the plaintiff, and that the judgment for the defendant can not stand. *Id.*, 592

10. It is proper in personal injury cases to ask a physician, testifying as an expert, whether certain injuries are permanent or not, and whether the same are of a class that are necessarily painful. *L. E. & W. Ry. Co. v. Wills*, 649

EXECUTIONS—See HOMESTEAD, 4.

EXEMPTIONS.

1. Where a debtor makes out, signs and swears to a schedule of his property, and leaves the same at a place agreed upon for the officer, it amounts to a delivery where the understanding is that the officer shall call there for it. *Miller v. Rolen*, 350

FISH.

1. A pond that is private property is not included within the terms of the statute prohibiting the catching of fish with seines or similar devices in "water-courses wholly within or running through the State of Illinois." *Bridges v. The People*, 656

FORMER ADJUDICATION—See DRAINAGE, 4.

FRAUD—See MORTGAGES, 5, 6; NEGOTIABLE INSTRUMENTS, 3; REAL PROPERTY, 1.

GAMING—See NEGOTIABLE INSTRUMENTS, 2.

1. Under the laws of this State all manner of gambling obligations are void in the hands of everybody, and such obligations can never be made valid by any renewals or transfers to innocent purchasers. Therefore a trust deed, given to secure a note given in payment of a gambling debt, though once renewed, and transferred to the hands of an innocent purchaser, is void. *International Bank of Chicago v. Vankirk*, 23

GARNISHMENT.

1. Garnishees are not liable for costs, but for the amount in their hands belonging to the debtor in attachment; and the attaching creditor can make a demand that will be availing only by suing out the writ and causing it to be served on the garnishees; and from the time of service the money then in their hands, belonging to the debtor in attachment, becomes subject to the legal claims of the attaching creditor against such debtor. *Ham v. Peery*, 341

2. The proper practice in such cases is to enter judgment against

GARNISHMENT. *Continued.*

- the garnishee in favor of the defendant in attachment for the benefit of the attachment creditor, and whatever surplus there may be after paying the creditor and costs, belongs to the debtor in attachment. *Id.*, 341

GUARANTY—See SALES. 3.

1. In an action brought to recover upon the guaranty of certain promissory notes, this court holds that in view of a contract between the parties hereto, calling for the indorsement by defendant of certain classes of notes received in a given business, the liability was a continuing one, and required such indorsement, when the contingency provided for arose, and that the contention upon the part of the defendant that the guaranty in question was a subsequent transaction and was obtained without any new consideration, can not avail him. *Windels v. Milwaukee Harvester Co.*, 521

GUARDIAN AND WARD.

1. In the absence of evidence to the contrary, it will be presumed that a guardian might have kept funds of his ward at interest. *Steyer v. Morris*, 382
2. Where such funds continue to be in excess of expenditures in behalf of the ward, failure to so invest at reasonable intervals will render the guardian liable for interest. *Id.*, 382
3. The estate of a ward should not be charged for legal services rendered his guardian, in a controversy arising through such guardian's fault. *Id.*, 382

HIGHWAYS.

1. In an action brought against highway commissioners, in their individual capacities, to recover damages alleged to have been sustained by plaintiff through the 'drainage of water upon his land, it is held: That the evidence failed to show that plaintiff had suffered any appreciable damage from the acts complained of; that plaintiff's land was servient to that from which the water was drained, and that in a state of nature the water flowed in the same direction as it did after the acts complained of were committed. *Crohen v. Ewers and Snyder*, 34
2. It was competent in the case presented, for qualified witnesses to give their opinion as to whether the plaintiff's land was damaged by the acts complained of. *Id.*, 34
3. Compliance with the statutory requirements as to the giving notice, by highway commissioners, of a hearing upon a petition to lay out a new road, is jurisdictional, and evidence that notices were properly posted must be preserved. *Johnson v. Stephenson*, 88
4. Highway commissioners may properly refuse to entertain a petition touching the location of a road, the real object thereof being to locate a disputed boundary line between land owners. *People v. Davis*, 162
5. The commissioners of highways have the right to control the amendment of a record according to the fact, and to order the clerk to make the amendment accordingly; and when the record is once

HIGHWAYS. Continued.

amended in a proper and legal manner, it has the same force and effect as though originally made as amended, and can no more be contradicted by parol than any other lawful record. *County of DuPage v. Martin*, 298

6. Upon an application by a town board of road commissioners to the board of county supervisors for the payment by the county, under Sec. 19, Roads and Highways and Bridges Act, of one-half the expense of the construction of a bridge, the supervisors must not refuse the application because there is no formal proof of the facts alleged in the petition; but the petition, if it states the jurisdictional facts, with the affidavits and estimates, constitutes a *prima facie* case. If the supervisors have doubts as to the alleged facts, it is their duty to investigate. *Id.*, 298

7. In a mandamus proceeding by the commissioners against the county, the court may receive evidence that was not before the supervisors. *Id.*, 298

8. The term highway includes all kinds of public ways, and as used in Secs. 77 and 78 of the Railroad and Warehouse Act would include a street in a city and should be so applied, unless it is apparent that by some other legislative provision the exclusive control and jurisdiction over, and the right to prevent obstructions to such streets has been vested in the local municipality. *Ohio, I. & W. Ry. Co. v. People of State of Ill.*, 473

HOMESTEAD.

1. A husband can have a homestead in his wife's property to the same extent as if the title to the property was in himself; he can have but one homestead. If it attaches to property owned by the wife he can not have another in property, the title to which is in himself. *Herdman v. Cooper*, 330

2. Where a debtor resides upon a lot worth more than \$1,000, it alone is his homestead, although other lots are within the same inclosure and used for family purposes. *Id.*, 330

3. Upon a bill filed to set aside the sale of a lot upon the ground that complainants were entitled to a homestead therein, and also on account of the alleged irregularity of such sale, this court holds that the fact that a person named bid off said lot at the sale, under a certain execution, did not make the same complete as to him, in the absence of payment to the sheriff; that upon failure to do so, it was the duty of the sheriff to readvertise the property for sale; that his return of the execution, unsatisfied, to the office of the clerk, did not relieve him from his duty to hold the same until he had disposed of the levy by a sale; that in such case, should the property fail to bring upon the resale the amount offered upon the first sale thereof, the first purchaser would be responsible for the difference; and declines to interfere with the decree for the defendants. *Id.*, 330

HUSBAND AND WIFE—See CONTRACTS, 7; HOMESTEAD, 1, 2; INSOLVENCY, 1.

1. Marriage is a sufficient consideration for an ante-nuptial contract fairly and understandingly entered into. *Edwards v. Martin*, 145

HUSBAND AND WIFE. *Continued.*

2. A wife may waive any and all right to any portion of her husband's estate by such agreement and be bound thereby, where fraud, collusion, overreaching or advantage taken can not be shown. *Id.*, 145

3. In the case presented this court holds that under the agreement in question the widow was not entitled to widow's award in her husband's estate, and that the judgment in her favor can not stand. *Id.*, 145

INJUNCTIONS—See INSTRUCTIONS, 10.

1. The dissolution of a preliminary injunction can not affect the ordinary progress of a suit in equity, it being collateral to the main object of the bill. *Martin v. Jamison*, 248

2. This court declines, in view of the evidence, to interfere with a decree perpetually enjoining a railway company from building a railroad in or upon a certain street in a municipality named. *E. St. L. Union Ry. Co. v. City of East St. Louis*, 398

INNKEEPERS

1. No prosecution can be maintained under the act touching frauds upon innkeepers, for a refusal to pay for something which has not been "obtained." *Sundmacher v. Block*, 553

INSOLVENCY.

1. A receiver can not, under a contract between his insolvent and another, enter upon and use the property of the latter, and without his consent, repudiate or change the terms thereof. *St. L. & C. R. R. Co.*

2. This court holds as erroneous an order disallowing the claim of a married woman against an insolvent firm of which her husband was a member. *Van Nostrand v. Mealand*, 178
v. E. St. L. & C. R. R. Co., 354

INSTRUCTIONS—See MALICIOUS PROSECUTION, 1; MALPRACTICE, 1; MASTER AND SERVANT, 7, 8; RAILROADS, 2, 14; REPLEVIN, 2; WITNESSES, 6.

1. Under the pleadings and evidence in the case presented the burden of proof was on the plaintiff all the way through, and an instruction that in a certain contingency the burden might be shifted to the defendant was error. *Chase v. Nelson*, 53

2. It is the duty of a trial court to see that all of its instructions are correct and harmonious, and not to trust to good ones to cure bad ones. *Id.*, 53

3. Although instructions contain correct propositions of law, yet where such propositions are repeated so often and in so many different forms by the court as to assume the character of an argument they are open to serious criticism. *Wilmerton v. Sample*, 60

4. Instructions in an action for malicious prosecution held to have been erroneous, in that they assumed the existence of material facts which were in dispute and were based upon hypotheses which were unsupported by any evidence. *Id.*, 60

5. An instruction not based upon evidence adduced should not be given. *Morehouse v. City of Dixon*, 107

INSTRUCTIONS. *Continued.*

6. Nor one that it is suggestive or argumentative. *Id.*, 107
7. Nor one that calls the attention of the jury to a fact and gives it undue prominence. *Id.*, 107
8. An instruction not based upon evidence introduced should be refused. *Steel v. Shafer*, 185
9. Where the instructions complained of are not abstracted, this court will not consider the objections made thereto. *Westphal v. Austin*, 230
10. Although an instruction may be erroneous, considered as an abstract statement of law, yet where the court can see that the jury were not misled, the judgment will not, on account of such error, be reversed. *Westgate v. Aschenbrenner*, 263
11. Where a plaintiff states such a case in an instruction as requires a verdict in his favor, and requests the court to instruct the jury that, if they find the facts to be as stated, then they *must* return a verdict for the plaintiff, it is error for the court to substitute the word *may* for *must*. *Plano Manfg. Co. v. Parmenter*, 270
12. In the absence of evidence going to show that a witness stands in fear of being discharged by his employer, a party to a given suit, unless he testifies favorably to the latter, an instruction should not be given based upon such assumption. *St. L., A. & T. H. R. R. Co. v. Walker*, 388
13. In the case presented, this court holds that an instruction asked in behalf of the defendant, was properly modified by the trial judge, and declines, in view of the evidence, to interfere with the verdict for the plaintiff. *City of Olney v. Riley*, 401
14. While it is the duty of a court, under the statute, to mark all instructions read to the jury, "Given," failure to do so in case of instructions shown to have been given, the omission working no harm, can not be complained of. *St. L., A. & T. H. R. R. v. Hawkins*, 406
15. An instruction should not define particular acts in a given case as negligence. *St. L., A. & T. H. R. R. Co. v. Russell*, 443
16. It is proper to refuse to repeat, or absolutely refuse an instruction where the same contains elements calculated to mislead or confuse the jury. *L. E. & W. Railroad Co. v. Christison*, 495
17. Supposed errors in instructions should be pointed out specifically, and not referred to in general terms. *Razor v. Razor*, 527
18. It is not necessary that every instruction given in a case should be a full and complete statement of the rules and principles of law involved. *Rockford Ins. Co. v. Wright*, 574
19. An instruction in an action under the Dram Shop Act, purporting to state the right of recovery in the words of the statute, should not omit the clause, "by giving or selling (to him) intoxicating liquors." *Campbell v. Magruder*, 604

INSURANCE.

1. In an action upon an insurance policy upon a building "while occupied by assured as a country store and dwelling," which policy

INSURANCE. *Continued.*

contained a clause providing for a forfeiture in case the building became vacant and unoccupied for more than ten days without notice to the company, etc., it is *held*: That the forfeiture did not attach when the building ceased to be occupied as a dwelling, but only in case it was not occupied at all. *Burlington Insurance Co. v. Brockway*, 43

2. In an action on a policy of insurance where the defense was that the dues of deceased had not been received by defendant, it is *held*: That the evidence conclusively showed that the deceased had paid his dues to the proper officer of his local lodge, and that the defense was wholly without merit. *Brotherhood of Ry. Brakemen v. Knowles*, 47

3. Where the agents of an insurance company issued a policy of insurance, which was accepted by the insured, but on which the insured failed to pay the premium when due, and the agents, under their contract with the company, paid the premium, in an action brought in the name of the company for the use of the agents against the insured to recover the amount of the premium, it is *held*: That the agents were subrogated to the rights of the company as to the claim under the policy, and that no assignment was necessary to enable them to recover the premium advanced by them. *Gillett v. Ins. Co. of North America*, 284

4. While an affidavit as to the state of his health, filed by an ex-soldier upon application for a pension, is admitted in an action upon a life insurance policy issued to him, as tending to show that at about the time he took out the same he was suffering from a disease which he fraudulently failed to disclose to the company, and which, if he had, would have prevented his being accepted as a risk, it is not conclusive, and the jury must determine from all the evidence, whether the facts set forth in such affidavit were true or that the application for insurance correctly stated his condition. *New Home Life Ass'n of Ill. v. Owen*, 413

5. Where the agent of an insurance company fraudulently writes a note above the signature of a person who signs what he supposes to be an application for insurance, it is void while in the hands of said company although the person signing might be guilty of such carelessness in not ascertaining what he was signing, as would make him liable to a *bona fide* assignee before maturity. *Dwelling House Ins. Co. v. Bailey*, 488

6. It should not be assumed because of the failure of a court to discuss a certain clause in an insurance policy, the basis of a given action, that the same was overlooked. *Mut. Accident Ass'n of the Northwest v. Tuggle*, 509

7. A death from an overdose of laudanum, taken by mistake, is within a clause in a policy of insurance limiting its liability to "injuries received by or through external, violent and accidental means." *Id.*, 509

8. An insurance agent is a proper source of information as to the practice of his company, and it is bound by the statements of such agent,

INSURANCE. *Continued.*

whatever department of its business he has in charge. *Phenix Ins. Co. v. Hart*, 517

9. The placing of a mortgage upon a tract of land other than that upon which a house stands, will not vitiate a policy of insurance on such house, a provision therein prohibiting incumbrances without permission, although the policy refers to it as standing upon the aggregate number of acres. *Id.*, 517

10. In an action brought to recover upon a life insurance policy, the defendant contending among other things that assured died a suicide, and that the plaintiff is entitled to recover only an amount named, this court holds as proper the rulings of the trial court touching the defendant's demurrer to the first replication to the defendant's third plea; likewise as to receiving evidence under the second replication to said plea; and declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Conn. Mut. Life Ins. Co. v. Smith*, 569

11. A building insured as, and leased for a store room, in the process of ordinary preparation—not repair—for such purpose, is not vacant or unoccupied. *Rockford Ins. Co. v. Wright*, 574

12. Where an insurance company has, by its agent, received notice of the vacancy of a building insured therein, and said agent assures the policy holder that it is "all right and we will take care of it," it can not, in case of loss during vacancy, insist upon the same as a breach of the contract, and thus avoid payment. *Id.*, 574

13. As to ordinary policies of life insurance the beneficiary has a vested interest which is beyond the control of the party procuring the insurance. *Sauerbier v. Union Central Life Ins. Co.*, 620

14. An intended beneficiary need not be named in order to invest him with such interest, unless required by the policy, and a father may thus provide for his unborn child. *Id.*, 620

15. Where the description is uncertain in such case, parol or other extrinsic evidence is admissible to aid it. *Id.*, 620

16. The assurance by the agent of an insurance company of the sufficiency of the statement in and signature to, an application, to accomplish the purpose of the applicant, will bind the company. *Id.*, 620

17. The acceptance of an application and the making of it a part of a policy by an insurance company will estop it to deny the interest of children mentioned together with a wife in the application, although the policy mentions the wife as the sole beneficiary. *Id.*, 620

18. In the case presented, this court holds that the beneficial interest was intended to be in the wife and children equally. *per capita*, and that the policy should be construed in accordance with the intention of assured. *Id.*, 620

19. A court of equity will correct and reform a policy of insurance where by fraud, accident or mistake it has been improperly drawn, but it is not necessary to seek such relief where the doctrine of estoppel may be applied. *German Ins. Co. v. Miller*, 633

INSURANCE. *Continued.*

20. A condition in a policy declaring that a mortgage or incumbrance of the property mentioned therein avoids the same, is not wholly broken by a mortgage of a part of the property, consisting of separate articles, and capable of specific valuation, and in such case the insurance would be vitiated as to the part so mortgaged only. *Id.*, 633

21. Answers written in an application for fire insurance, by an agent, without the assent of the applicant, will not bind him. *Id.*, 633

22. An insurance company can not insist upon non-ownership of personal property covered to avoid payment, where assured informed its agent at the time the application was signed, that another person was interested in a certain portion of it, but was told by such agent that the property could be written in his name. *Id.*, 633

23. Conditions involving a forfeiture should be strictly construed. *Id.*, 633

24. A company will not be permitted to avoid a policy upon ground of over-valuation of property covered, where its agent saw the same at the time the application was filled out, and assented to the figures. *Id.*, 633

25. A mistaken or untrue statement of a material matter will not avoid a policy, when the company or its agent knew the real facts, especially where an agent fills up the application, and knowing the real facts misstates them, either purposely or by mistake. *Id.*, 633

INTEREST—See PRACTICE, 23.

1. Under an agreement between the president of several railroad companies and a bank, an account having been opened therewith by him in their behalf under a certain name, that said bank should be paid interest on advances and overdrafts, an action may be brought against all the companies to recover such interest. *Chicago P. & St. L. Ry. Co. v. Ayers*, 607

2. The fact that one of such roads was being built and not in operation could not affect such right, nor could the fact that as between themselves such companies kept separate accounts and had a system by which balances were struck.

JUDGMENTS AND DECREES—See HOMESTEAD, 4.

JURIES—See PRACTICE, 35, 36, 37, 38, 39, 40.

JURISDICTION—See APPEAL AND ERROR, 1.

1. Where a party appears and submits himself to the jurisdiction of the court it is of no importance whether the summons was void or not, or whether in fact there was any process at all. *Yaeger v. City of Henry*, 21

2. In the absence of a bill of exceptions an Appellate Court will presume that every fact necessary to bring the case within the jurisdiction of the court and establish a cause of action was proven on the trial. *Id.*, 21

3. The power possessed by a court of equity to dismiss a bill, on its

JURISDICTION. Continued.

own motion, for want of jurisdiction, on the ground that the parties have a complete remedy at law, must be exercised with a sound discretion, and where to dismiss a bill on this ground would impose great and unnecessary hardship upon the parties it should not be done. *Allison v. Maley*, 85

4. In the case presented, this court holds that the motion of appellees to dismiss the appeal upon the ground that a freehold is involved can not be sustained, the question being as to the existence and priority of mortgaged liens. *Piper v. Headlee*, 93

5. A bill averring that a majority of the directors of a school district, defendants, intended by fraud and indirection to pay out the public money to that district belonging, through an incompetent person named, who was by them employed as a teacher, to an assistant teacher, in fact the principal of the school, and who, at the time of such alleged employment, held no certificate as a teacher, makes a case for equitable jurisdiction. *Martin v. Jamison*, 248

6. In such case, equity will restrain the payment of any of such public moneys for such unlawful, and for any fraudulent purpose, to any one, by the board of directors of such district. *Id.*, 248

7. Equity once having obtained jurisdiction, will retain it until complete justice is done, even though adequate relief can be reached only by personal judgment. *Id.*, 248

8. A justice may try an action for injury to stock in any form appropriate to the injury done. *Northrup v. Smothers*, 588

JUSTICES.

1. In an action brought to recover for injury to certain hogs, this court holds that the plaintiff excepted at the proper time to a certain ruling of the trial court, and that in view of the evidence, the judgment for the defendant can not stand. *Id.*, 588

LANDLORD AND TENANT—See RAILROADS, 4, 5, 6.

1. Lands can not be leased by parol for more than one year. *Bailey v. Ferguson*, 91

2. In an action of forcible entry and detainer, this court holds, in view of the evidence, that the judgment for the defendant can not stand. *Id.*, 91

3. In distress proceedings instituted to recover certain rent claimed under a lease providing for a crop rent in part, for certain lands, the contention on the part of the lessee being that he had purchased such rental before the sale of the property in question to the plaintiff, this court holds that as between the grantor and the lessee, growing crops might be sold by parol contract, and declines to interfere with the judgment for the defendant, it appearing that the plaintiff had notice of the sale before the completion of the contract of purchase of said lands. *Nuernberger v. Von Der Heidt*, 404

4. After an assignment over, the assignee of a lease will continue liable upon any express covenants therein entered into by him in the assignment to himself. *Consolidated Coal Co. of St. Louis v. Peers*, 453

LANDLORD AND TENANT. *Continued.*

5. Where by the terms of a lease payments are to be made in monthly installments, an action may be brought to recover for more than one month, and the plaintiff is not required to wait until the expiration of any particular year or time longer than a month before bringing suit. *Id.*, 43

LIMITATIONS—See PRINCIPAL AND SURETY, 3.

MALICIOUS PROSECUTION—See INSTRUCTIONS, 4.

1. In an action for malicious prosecution, where the plaintiff had been arrested for malicious mischief, an instruction that a person who is in possession of property, claiming to be the owner of it, can not be guilty of malicious mischief in destroying the same, nor of larceny in regard to the same, is erroneous in that it ignores the question whether the claim of ownership is made in good faith. *Wilmerton v. Sample*, 60

2. Under counts charging malicious prosecution, the burden is upon the plaintiff to prove a want of probable cause for a criminal prosecution. *Sundmacher v. Block*, 553

3. A defendant should not in such case, there having been probable cause, suffer substantial damages, although the manner of the original arrest was humiliating and offensive. *Id.*, 553

MALPRACTICE.

1. In an action to recover for death alleged to have been caused by the malpractice of the defendant, a physician, an instruction which authorized a recovery by the plaintiff, in case the jury found that the negligence of defendant contributed to the death of plaintiff's intestate, was erroneous. Under the statute of this State, to justify a recovery in such case, the negligence of defendant must have been the direct cause of death. *Chase v. Nelson*, 53

MANDAMUS—See HIGHWAYS, 4, 7.

1. A mandamus will not be awarded unless the petition therefor shows a clear right to have that done which is the basis of the request. *People v. Davis*, 162

MASTER AND SERVANT—See NEGLIGENCE, 2.

1. An employe injured through the negligence of his master may release him from liability therefor upon receipt of a sum agreed upon. *Chicago, Wilmington & Vermillion Coal Co. v. Peterson*, 114

2. In the case presented, this court holds, in view of the evidence, that under the statute it was sufficient for the plaintiff to notify the "mine car driver" that props were necessary in the room where he was at work; that the release in question was understandingly executed and delivered by the plaintiff to the defendant, and that in view thereof the judgment in his favor can not stand. *Id.*, 114

3. This court affirms a judgment for the plaintiff in an action brought for the recovery of wages. *Rippentrop v. Doctor*, 120

4. In work done under the charter powers of a railroad company by a contractor, he exercising the power given said company by its charter, such contractor is a servant of the company so far as the public is concerned, and it has the right to hold the company responsible for his

MASTER AND SERVANT. *Continued.*

acts, he being in reality the company that is acting. *Toledo, St. L. & P. C. Ry. Co. v. Conroy*, 351

5. This court declines, in view of the evidence, to interfere with the judgment for the plaintiff in an action brought by a servant to recover for personal injuries suffered through the alleged negligence of his employer. *Id.*, 351

6. In an action by an employe to recover for personal injuries suffered through the alleged negligence of his employer, a mining corporation, this court holds that through the wilful neglect of its statutory duty, a dangerous accumulation of gas took place, whereby the plaintiff was injured, and declines to interfere with the verdict in his behalf. *Muddy Valley Mining & Mfg. Co. v. Phillips*, 376

7. In an action brought to recover for personal injuries alleged to have been suffered by a servant through the negligence of his employer, a railroad company, this court holds, that in view of the giving of erroneous instructions touching the question of care and negligence upon the part of both parties, that the judgment for the plaintiff can not stand. *Chicago & A. R. R. Co. v. Matthews*, 541

8. In the case presented, this court holds that the jury should have been instructed to determine, from all the facts and circumstances in evidence, whether, under a fair and reasonable construction of all the rules offered in evidence, the plaintiff was in the line of his duty when injured, and if he failed to observe one of these rules, whether it was under such circumstances as would justify him in such failure. *Id.* 541

9. In an action by an administrator to recover for a personal injury alleged to have been occasioned by a master's negligence, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand. *Litchfield Car & Machine Co. v. Romine*, 642

MECHANICS' LIENS.

1. Under Secs. 1 and 2 of Chap. 82. R. S., a lien for labor or material attaches at the time when the contract, under which the same was furnished, was made. *Freeman v. Arnold*, 216

2. In a proceeding to enforce a mechanic's lien, this court construes a writing given the defendant by the complainant setting forth the amount for which certain labor and material would be furnished and affirms the decree for the latter. *Tobin v. Collier*, 478

MINES—See MASTER AND SERVANT, 2, 6.

MORTGAGES—See GAMING, 1.

1. The entering satisfaction of a mortgage and taking a new one, when designed by the parties to be a continuation of the first mortgage, is not a satisfaction but a continuation thereof, and as to an intervening judgment creditor of the mortgagor does not give him priority. *Piper v. Headlee*, 93

2. Upon a bill filed to foreclose a mortgage this court holds, in view of the evidence, certain property in question having been misdescribed, a new mortgage being given and the rights of minors involved, that the

MORTGAGES. *Continued.*

decree of the trial court can not stand, and reverses the cause with directions as to the decree which should be entered herein. *Id.*, 93

3. A mortgagor has a right to secure a debt not maturing in two years with a chattel mortgage for the full period of two years. *Aultman & Co. v. Silvis*, 164

4. A creditor and mortgagee may declare his whole debt due, in advance of the time named in the note, in case of the seizure of the mortgaged goods by another, or in case of danger of losing his security, the mortgage containing a provision to that end. *Id.*, 164

5. Where it is agreed between the mortgagor and mortgagee in a chattel mortgage at the time the same is made, that the mortgagor may sell at retail in the usual course of business and at its market value any of the property covered, the entire proceeds of such sales to be turned over to the mortgagee and the amount credited on the indebtedness secured, such understanding or agreement renders the mortgage fraudulent in law and void as to creditors. *Deering & Co. v. Washburn*, 434

6. The contrary seems to be the case when the agreement is made subsequent to the giving of mortgage. *Id.*, 434

7. Upon bills filed to foreclose mortgages, the fact being that subsequent to the giving thereof, the property in question was sold to another, it being alleged that the grantee assumed the same, this court holds, there being no allegation in complainant's bill that the grantee ever accepted the deed from the grantor, that the recital in said deed is not the promise of the grantee; that in the absence of an averment of assent said recital is not sufficient, standing alone, to create a liability against him, and that the averments of the bill are not sufficient, on a default, to authorize a decree *pro confesso* against said grantee for a personal liability for the debt of the grantor. *Baer v. Knewitz*, 470

8. The fact that a mortgagor of property located in this State, removed to and has resided in another State for such a length of time as will defeat an action at law upon the note given by him, will not affect the right to proceed in chancery to foreclose. *Wooley v. Yarnell*, 595

MUNICIPAL CORPORATIONS—See HIGHWAYS, 8; OFFICERS, 1, 2.

1. In an action brought to recover from a municipality for personal injuries alleged to have been occasioned by its negligence, this court holds that on account of the giving of wrongful instructions for the defendant, and the refusal of one that was proper in behalf of the plaintiff, the judgment against the latter can not stand. *Morehouse v. City of Dixon*, 107

2. A municipality must use reasonable diligence and care to keep a sidewalk in a reasonably safe condition. *Brownlee v. Village of Alexis*, 135

3. Notice of the unsafe condition of a sidewalk may be implied if the defects complained of have existed for such a length of time that the municipal authorities, or any of its officers and agents whose duty it is to give notice thereof to the city, by the exercise of reasonable care might have known of such defect. *Id.*, 135

MUNICIPAL CORPORATIONS. *Continued.*

4. It is not necessary to a recovery that a municipality should have had notice of the condition of the particular plank which caused the injury in question. *Id.*, 135
5. Notice to a street commissioner is notice to a municipality. *Id.*, 135
6. Where repairs are made by a municipality, to a sidewalk, it is bound to take notice of the character of the same, and the condition of the walk when repaired, whether safe or unsafe. *Id.*, 135
7. Actual or constructive notice is not required in cases of defective construction, whether the defects exist in method or material. *Id.*, 135
8. In the case presented, this court holds that evidence of the condition of the sidewalk in question shortly previous to the accident should have been admitted. Also as to portions thereof distant from the point where the injury occurred. *Id.*, 135
9. A city council has power to rescind a vote to pay a certain sum in settlement of a contested claim so long as such action of the council remains executory. *City of Rock Island v. McEnisy*, 218
10. A municipal corporation is bound, with reference to all of its street crossings, to use reasonable care and diligence to keep the same in a reasonably safe condition for the use of the public. *City of Vandalia v. Ropp*, 344
11. Whether such care was exercised in a given case is a question of fact for the jury. *Id.*, 344
12. Likewise whether, under given circumstances, the plaintiff was guilty of contributory negligence. *Id.*, 344
13. Evidence on behalf of the plaintiff, going to show that repairs were made to whatever caused a given injury after the occurrence thereof, should be admitted in an action to recover therefor. *Id.*, 344
14. A municipality may revoke an ordinance granting a right of way through its streets, before the same has been accepted. *E. St. Louis Ry. Co. v. City of East St. Louis*, 398
15. Want of reasonable care on the part of the officers of a city as regards the keeping in repair of streets, crossings and the like, will warrant a recovery for personal injuries suffered by reason thereof. Gross negligence is not necessary to entitle a plaintiff to recover in such action. *City of Olney v. Riley*, 401
16. Where municipal corporations omit the duty of erecting railings or other guards on the sides of a walk adequate for the protection from danger, by falling therefrom, of persons using the walk with ordinary care and caution in walking thereon, it will be sufficient to sustain a verdict for gross negligence. *City of Mt. Vernon v. Brooks*, 426
17. A cripple using crutches has the same right to use a sidewalk as a sound person, but must exercise a higher degree of care. *Id.*, 426
18. A city assuming to repair a sidewalk must do so in such a manner as to render the same reasonably safe for travel. *Id.*, 426
19. In view of Sec. 2, Chap. 146 Starr & C. Ill. Stats., a municipal corporation will not be excused from repairing its sidewalks, there being no funds in its treasury, if a tax levy is already made, against

MUNICIPAL CORPORATIONS. *Continued.*

which warrants may be issued in anticipation of its collection by virtue of that section. *Id.*, 426

20. In cases of this sort it is for the witness to give the facts as to the condition of a given walk and the jury to decide as to its safety. *Id.*, 426

21. A city is bound to use ordinary care to keep its walks in a reasonably safe condition for persons using ordinary care and with the ordinary capacity to care for themselves. *Id.*, 426

22. In certain cases the same act may be an offense against the State and against a municipality, and may be punished by both. *Ohio, I. & N. Ry. Co. v. People of State of Ill.*, 473

23. In view of the evidence, this court reverses the judgment for the plaintiff in an action brought by one municipality against another to recover certain money collected for taxes. *Town of Rushville v. President, etc., of Rushville*, 503

24. A town is so far interested in a controversy involving the cancellation of spurious orders outstanding against it, as to justify the raising of money and incurring of liability in regard thereto for the payment of professional services rendered therein. *Town of Bloomington v. Lillard*, 616

NEGLIGENCE—See INSTRUCTIONS, 16; MALPRACTICE, 1; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; PERSONAL INJURIES; RAILROADS.

1. Gross negligence is the want of ordinary care; what constitutes ordinary care varies with the circumstances of each case; one must act under all circumstances as a reasonably prudent person should act. *Chicago, Wilmington & Vermillion Coal Co. v. Peterson*, 114

2. It is against public policy to allow the provisions of a statute, touching the care an employer must exercise with regard to the protection of his employes from personal injury, to be dispensed with by contract. *Id.*, 114

3. In an action brought to recover from a stock yard company for injury to stock alleged to have been occasioned through its negligence in leaving the same exposed to stormy weather, this court holds, in view of the evidence, that the plaintiff was not guilty of contributory negligence as to the giving of directions touching the care of the stock; that the jury were warranted in finding that said stock was injured by being exposed to stormy weather over night; that the admission in evidence of testimony as to the conversation of the plaintiff with a yard foreman touching the care of the stock was proper; and declines to interfere with the verdict for the plaintiff. *St. Louis Nat. Stock Yards v. Tiblier*, 422

4. In such cases, the measure of damages is the difference in the market value of such stock when received by the stock yard company and when delivered to the consignor. *Id.*, 422

NEGOTIABLE INSTRUMENTS—See GUARANTY, 1; PRINCIPAL AND SURETY, 1.

NEGOTIABLE INSTRUMENTS. *Continued.*

1. A written instrument may be both a receipt and a contract, in which case that portion operative as a receipt may be contradicted or explained like any other receipt. *Hossack v. Moody*, 17
2. In an action to recover from the defendant the amount of a draft made payable to him and drawn upon the plaintiffs by their agent, the fact being that the same covered a sum lost by such agent in gaming, this court holds that defendant was simply a stakeholder for said agent, and that as he paid out the amount thereof as directed by such agent, and had no notice of the plaintiffs' right, the judgment in his favor can not be interfered with. *Oberne, Hosick & Co. v. Bunn*, 122
3. In view of the evidence, this court affirms the judgment for the defendant in an action brought by an insurance company to recover upon a note alleged to have been given by him in payment of the premium on one of its policies, the defendant contending that its execution was procured through circumvention and fraud, he supposing he was signing an application for insurance, instead of a note. *Dwelling House Ins. Co. v. Downy*, 524
4. In an action brought to recover a balance claimed to be due upon a promissory note, the defense being payment and the statute of limitations, the judgment being for the plaintiffs, this court holds, in view of affidavits filed by the defendant, that a new trial should have been granted upon the ground of newly discovered evidence. *Hewitt v. Hexter & Co.*, 585
5. The alteration of a promissory note after delivery which in no manner changes the rights or interests, duties or obligations of the parties thereto, has no effect. *Magers v. Dunlap*, 618
6. The words, "for labor" in the note in suit, do not import that the consideration was "wages" due the payee "as laborer or servant," within the meaning of the exemption act. Laborer or servant as used in the statute are designations of a class of persons. *Id.*, 618
7. In an action brought upon a note given in payment for the professional visits of a physician, the defendant should not be allowed to state the number of visits made, in order to show a partial failure of consideration, she having received all that was promised for the note or gave it for what she received. *Id.*, 618

OFFICERS—See CONSTABLES; DRAINAGE, 1.

1. The fact that under the terms of the bond of a township supervisor, he is required merely to perform his official duties "to the best of his skill and ability," will not excuse him for a misapplication of money. He must be held to know the law, and if in doubt, must obtain an adjudication that will protect him. *Purcell v. Town of Bear Creek*, 499
2. A board of town auditors has no power under any circumstances to ratify an illegal appropriation of town funds, and such ratification can not bind the town. *Id.*, 499
3. The payment of taxes irregularly levied amounts to a ratification, and such irregularity can not justify the keeping or misapplying the money so raised by a township supervisor. *Id.*, 499

PARTIES.

1. A party defendant can not defend a suit by showing a want of interest in the nominal plaintiff. *Gillett v. Ins. Co. of North America*, 284

PARTNERSHIP—See SALES, 7.

1. In an action of assumpsit brought to recover money alleged to have been loaned, where the defense claimed that the matters in controversy were part of a partnership transaction, it is *held*: That the issues were properly submitted to a jury, and that the evidence sustained the verdict for the plaintiff. *Blain v. Desrosiers*, 50

PAUPERS.

1. The mental capacity of a pauper and insane person after being adjudged insane, to choose a residence, can be shown in the absence of a readjudication. *County of McHenry v. Town of Dorr*, 240
2. In an action by a county to recover from a township for the care and support of a pauper during certain periods, this court holds that, notwithstanding said person had been adjudged insane, he had, when subsequently discharged, the legal capacity to choose his residence, and having chosen one outside the defendant, it is not liable for his keeping from the time he was taken charge of by the county the second time. *Id.*, 240

PAYMENT—See CONTRACT, 1; PRACTICE, 46.

1. Where one receives money which he is not entitled to retain, the law will, in proper cases, raise an implied promise to repay it to him from whom it came, but there is no such implied promise to perform a duty in respect to it which never rested upon him but did rest upon the other to pay to a third party. *Town of Rushville v. President, etc., of Rushville*, 503
2. In such a case a party is not compelled at his peril to determine where the money should have gone in the first place, but when satisfied it is not his he may clear himself of all responsibility by returning it to him from whom he received it, and to whom alone he is accountable. *Id.*, 503

PERSONAL INJURIES—See EVIDENCE, 10; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS.

1. Where a party while exercising due and ordinary care for his personal safety is injured by the negligent acts of another, there may be a recovery on account of such negligent acts, where both parties are equally in the position of right, which they hold independently of each other; the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care and diligence in endeavoring to avoid it. *City of Vandalia v. Ropp*, 344
2. In the case presented, this court holds that the defendant was guilty of negligence in not keeping in proper repair the crossing which caused the injury in question, and declines to interfere with the verdict for the plaintiff. *Id.*, 344
3. In an action brought to recover from a bridge company for personal injuries alleged to have occurred through its negligence, this

PERSONAL INJURIES. *Continued.*

court holds that the evidence justified the jury in finding that the plaintiff was seriously and permanently injured by frightened mules running against her and pressing her against the outer railing of its bridge; that she was in the exercise of reasonable care for her own safety when injured; that the negligence of the defendant in failing to provide reasonably safe and secure barriers to prevent live stock from crossing into the foot-way, or in the absence of such barriers, failing to establish and enforce rules for securing and controlling live stock while being driven across the bridge, occasioned the injury to plaintiff; that the trial court properly denied a motion on behalf of the defendant that plaintiff be required to submit to a bodily examination by physicians; that the point advanced by the defendant, that its negligence was not the proximate cause of the injury, is not tenable, and declines to interfere with the judgment in her behalf. *St. Louis Bridge Co. v. Miller*, 366

4. In an action to recover from a bridge company damages for the death of one of its employes, wherein the jury specially found that the accident occurred through the negligent construction of its tracks, this court holds, that the special findings were not warranted by the evidence, and that the verdict for the plaintiff based thereon should not be allowed to stand. *St. Louis Bridge Co. v. Fellows*, 456

PLEADING—See BASTARDY, 5; PRACTICE, 41.

1. An allegation that a certain person is married, is the same as one setting forth that he is *lawfully* married. *Vetten v. Wallace*, 390

2. In an action for tort where the averments of the declaration are divisible, the plaintiff may recover upon proof of enough to make a cause of action. *L. E. & W. Railroad Co. v. Christison*, 495

3. In such case mere surplusage will not vitiate, but where some statement on the subject is necessary and it can not be wholly rejected, a variance or failure to prove as laid is fatal. *Id.*, 495

4. The rule that the proofs must correspond with the allegations in a declaration applies only to such as are material in themselves, or being immaterial, are yet so interwoven with what are material as to make the latter depend upon them and thus expose both to a traverse. *Sundmacher v. Block*, 553

5. The formal *ad damnum* appearing at the end of a given count applies to all the counts that precede it. *Lake E. & W. Ry. Co. v. Wills*, 649

PRACTICE—See APPEAL AND ERROR; GARNISHMENT, 1; INSTRUCTIONS.

1. The construction of a writing shall be made by the court. *Bailey v. Ferguson*, 91

2. Where a motion for a new trial is overruled and the defeated party fails to except, it will be presumed that he acquiesces in the decision of the court, and it can not be assigned for error. *Barton v. Harris*, 106

3. A judgment of the trial court may be reversed *pro forma* on account of the failure of an appellee to file briefs herein. *Chi., Wilm. & Vermillion Coal Co. v. Peterson*, 114

PRACTICE. *Continued.*

4. A defeated party in this court has his election either to petition for a rehearing, or in proper case to pray for a certificate of importance, but can not do both unless the petition for rehearing can be disposed of within the time limited by statute within which to pray for a certificate of importance. *Oberne, Hosick & Co. v. Bunn*, 122

5. Objections to the introduction of certain evidence in a given case can not be primarily made in this court. *Town of Sheldon v. Burry*, 154

6. An objection to a deposition which could be removed or obviated by a new examination, or a re-examination, of the deponent, can not be considered after the case is called for trial. *Id.*, 154

7. In an action brought to recover for the services of a stallion, this court declines, in view of the evidence, to grant the motion of plaintiff to strike from the record defendant's bill of exceptions, the grounds thereof being the alleged breach of a rule of the Circuit Court, or to interfere with the judgment for the plaintiff. *Russell v. Thomas*, 158

8. In view of rule 7 of the Circuit Court, five days notice having been given, the only requirement is that the opposite party must have the proposed bill of exceptions, or a copy, four days before presentation; and a proper construction of the rule does not require the copy or bill of exceptions to be presented the same time that the notice is given. *Id.*, 158

9. Replying to an answer operates to waive the right to claim that the matters therein contained are immaterial; to raise that point, a plaintiff should stand by his demurrer thereto, and not take issue. *People v. Davis*, 162

10. A party will not be allowed to put in evidence his own statements as to an affray, or his own statements as to his mental condition at the time thereof, made at a time subsequent to the occurrence. *Steel v. Shafer*, 185

11. A general objection to admitting in evidence a reply to an interrogatory in a deposition, a portion thereof only being proper evidence, can not be made availing. *Id.*, 185

12. A court is not bound to grant a motion for a new trial because both parties may assent thereto. *City of Rock Island v. McEniry*, 218

13. This court is not authorized to set aside a verdict where no question of law is involved, unless the verdict is clearly against the weight of evidence. *Huber v. Schmacht*, 229

14. In the case presented, this court holds that the trial court erred in dismissing complainant's original and amended bills for want of equity; likewise in sustaining defendant's demurrer to said amended bill; likewise as to the assessment of damages on the dissolution of complainant's preliminary injunction, and reverses and remands the same with directions. *Martin v. Jamison*, 248

15. Upon appeal from a decree in chancery, where there is no certificate of evidence in the record, and the decree does not recite the evi-

PRACTICE. *Continued.*

dence nor the findings of the court below, the case must be reversed without regard to the merits. *Brechon v. Duis*, 258

16. No stipulation between the parties can excuse the appellant from a compliance with the commands of the statute as to the time in which a transcript of the record must be filed in this court. *Chicago Sash Door and Blind Manfg. Co. v. Shaw*, 260

17. Under Sec. 73, Chap. 110, R. S., regulating the time within which a certified copy of the record must be filed in the Appellate Court, the proper rule is to exclude the day on which the time commences to run and include the day to which it should run. *Chicago, B. & Q. R. R. Co. v. Evans*, 261

18. Upon petition for rehearing, where the petitioner complained that a point of law had been overlooked by the court, *held*, that as the point in question had not been presented by the instructions asked in the court below, it was not to be considered here. *Westgate v. Aschenbrenner*, 263

19. Where neither the prayer for an appeal nor the order of the Circuit Court granting the same, names the court to which the appeal is to be taken, but the transcript is filed in this court, the case must be stricken from the docket. *Mississippi Valley Man'f'rs Mut. Ins. Co. v. Bermond*, 267

20. Judgment reversed under rule 27, no brief having been filed by appellee. *Woodburn v. Baum*, 269

21. Where a decree of the Circuit Court was upon a former appeal reversed for a single error and remanded, and upon a retrial the court below corrected that error and entered a decree accordingly, upon a second appeal this court will not hold that the court below should have passed upon claims that had been adjudicated by this court upon the former appeal. *Henning v. Eldridge*, 273

22. The time within which an appeal from a judgment of this court to the Supreme Court may be prayed is limited to twenty days, and that time is not extended by the pendency of a petition for rehearing, but a party must elect which of these remedies he will pursue. He can not have both unless his petition for rehearing is disposed of within the twenty days. *Goldsbrough v. Gable*, 278

23. Where plaintiff was entitled under the statute to interest on his claim, but such interest was not included in the judgment, an objection raised by the defendant, appellant, to the amount of the judgment, the part objected to being less than the interest due but not included in the judgment, may be ignored by this court. *Gould v. Warne*, 279

24. Where the evidence in a given case is conflicting, it is for the jury to give the weight and credit to that introduced by each party, which they believe it is entitled to. *St. Louis Bridge Co. v. Miller*, 366

25. It is for the jury to say from the evidence in a given case whether the admitted failure of the defendant to perform his statutory duty was wilful. *Muddy Valley Mining & Man'f'g Co. v. Phillips*, 376

26. The rulings of the trial court upon questions arising in the progress of a given trial must be preserved in a bill of exceptions duly

PRACTICE. *Continued.*

authenticated; likewise the objections and exceptions; otherwise this court can not review such rulings, nor can the party excepting thereto have the benefit of such exceptions herein. *Lusk v. Parsons*, 380

27. Recitals of the clerk of the trial court in the transcript of the record as to what was done in a given case, are extra-official and of no legal effect. *Id.*, 380

28. Where in a given case the evidence is sharply conflicting upon material and vital questions of fact, the jury should be accurately instructed, and the instructions should be based upon the evidence. *St. L., A. & T. H. R. R. Co. v. Walker*, 388

29. Failure to advise this court by assignment of error upon the record of the errors relied upon to reverse in a given case, will excuse it from a consideration thereof. *E. St. L. Union Ry. Co. v. City of East St. Louis*, 398

30. Where the evidence in a given case is not preserved in the record, this court will assume that it authorized the findings. *Id.*, 398

31. The specific finding of the truth of an allegation in a bill not denied, but inferentially admitted, is not necessary to support a decree for complainant in a given case. *Id.*, 398

32. It is proper to enter the general verdict in a given case without requiring the jury to return a special finding upon an interrogatory which did not submit a question that was controlling. *O. & M. Ry. Co. v. Ramey*, 409

33. Specific objections to the admission of evidence by the trial court, general objection only thereto having been made therein, can not be considered by this court. *Wilderman v. Pitts*, 416

34. A witness should not be cross-examined as to matters not touched upon in chief. *City of Mt. Vernon v. Brooks*, 426

35. A motion filed to correct the record, so as to show the method of completing panel of grand jurors, by a defendant, previously to pleading to an indictment, should be overruled, where none of the grounds mentioned therein would have justified the court in quashing the indictment. *Nealon v. The People*, 481

36. A grand jury, when properly organized, meets and adjourns upon its own motion, without reference to the temporary adjournment of the court, and it may lawfully proceed in the performance of its duties whether the court is in session or not; but this right to remain in session will not extend beyond the final adjournment of the court for the term, but within such limits it will be governed by its own wishes, subject to the control that the court at all times has over it. *Id.*, 481

37. A mere irregularity in drawing a jury is not sufficient cause to sustain a challenge to the array, unless the irregularity complained of is of such a character as would probably have produced a change in the panel, or presented a list of names to choose from, different from those which would be produced by a compliance with the law. *Id.*, 481

38. In the case presented, this court holds as erroneous, the overruling of the challenge to the array of the petit jury, the county board

PRACTICE. *Continued.*

having disregarded the provisions of Sec. 2, Chap. 78, R. S. *Id.*, 481

39. When a case is called for trial, and the regular panel of twenty-four men is for any cause not full, the court may order it filled from the bystanders; but after the selection of the jury has begun and this number becomes reduced, so there are not twelve jurors to place in the box, the court should order only enough to be selected from the bystanders to keep twelve men in the box and need not keep the original panel of twenty-four full. *Id.*, 481

40. The questions to be asked of jurors on their *voir dire*, and the time permitted to be occupied in examining jurors, is largely within the discretion of the court in a given case. *Id.*, 481

41. A defendant seeking to raise a point touching a declaration, which might be obviated by amendment, should be required to specifically state it and should not demur generally. *Mut. Accident Ass'n of the Northwest v. Tuggle*, 509

42. This court will not reverse a case on a question which the trial court did not decide, and which, had it been presented thereto, might have been obviated. *Id.*, 509

43. Whether or not certain facts in evidence in a given case constituted "aid" in a legal sense, to a person in the doing of an alleged tort, is for the jury to decide. *Wilbur v. Turner*, 526

44. A witness should not be interrogated upon cross-examination as to a matter upon which a party in interest bases no claim, or one which calls for an argumentative reply. *Truesdale Mfg. Co. v. Hoyle*, 532

45. It is proper upon calling a party to a suit as a witness to require him to state and produce letters and telegrams in his possession received from the party calling him, the same relating to the subject in controversy, without serving notice, or a subpoena *duces tecum* specifying what papers are wanted. *Id.*, 532

46. Where the pleas in a given case do not deny the plaintiff's cause of action, but allege payment and set-off as a defense, the burden of proof is thrown upon the defendant and gives him the right to begin and conclude. *Id.*, 532

47. A technical defense is valid if supported by the evidence. *Rockford Ins. Co. v. Wright*, 574

48. Unless an exception is preserved by embodying it in a bill of exceptions, no ruling, however improper, that does not relate to the pleadings, or appear on the face of the judgment, can be reviewed in an Appellate Court. *City of Jacksonville v. Cherry*, 617

49. A recital inserted by the clerk in the record immediately following the judgment, to the effect that an exception was taken thereto, can not be regarded as a part of the record. *Id.*, 617

50. A defendant should not be defaulted where pleas on his behalf are on file and undisposed of. *City of Pana v. Humphreys*, 641

PRINCIPAL AND SURETY.

1. The rule that the payee or indorsee of negotiable paper takes it

PRINCIPAL AND SURETY. *Continued.*

free from conflicting equities between the makers or obligees, of which he had no notice, applies to equities between principal and surety, as well as other equities, and if the payee has no notice of suretyship, there is no equitable obligation to protect the surety resting on him; he is justified in treating them both as principals. *Piper v. Headlee*, 93

2. In the case presented, this court holds that the amount in question was wrongfully paid to the county treasurer by the township supervisor, and that the judgment for the plaintiff in an action on the official bond of such officer can not be interfered with. *Id.*, 499

3. In an action brought to recover a sum of money paid by plaintiff as surety upon a promissory note for defendant, this court holds that the evidence fails to establish a new promise, the defense being the statute of limitations, and that the judgment for the plaintiff can not stand. *Ward v. Redden*, 643

RAILROADS—See INJUNCTIONS, 1; INTEREST, 1; MASTER AND SERVANT, 4.

1. Where two minor brothers were both killed in the same accident, through the alleged negligence of defendant, a recovery in an action brought to recover damages for the death of one constitutes no bar to a recovery in another suit for the death of the other, although the administrator of both estates was the same person, and the heirs for whom he sued were the same in each case. *Illinois Central Railway Co. v. Slater*, 69

2. In an action brought against a railway company to recover damages caused by the killing of plaintiff's intestate at a crossing of a highway and defendant's track, where the chief ground of complaint was the failure of defendant to have a flagman stationed at the crossing at the time of the accident, it is *held*: That it was error for the court to instruct the jury that if it was a *reasonable* precaution to be exercised by the persons in charge of defendant's engine to keep a flagman at the crossing, then a failure to do so would be negligence. Unless such precaution was *necessary* it could not be said to be negligence to have omitted it. *P. P. Union Ry. Co. v. Herman*, 287

3. The failure of a railway company to keep a flagman at a crossing is not negligence *per se*, and an action can not be directly predicated on such failure and consequent injury, but it may be based upon the failure of the company to approach the crossing with due care and caution; and the failure to keep a flagman at the crossing, or any other omission, may be shown by way of specifications of the cause of such failure. And if from all circumstances it appears that the doing of a particular thing is necessary to the safety of persons crossing the tracks then the company is required to do that thing. *Id.*, 287

4. An instruction to the effect that deceased was required to exercise reasonable care for his own safety at the *time* of receiving the injury was improper. *Id.*, 287

5. Franchises as well as lands and tenements may be demised. A railroad company may lease its franchises and property by authority

RAILROADS. *Continued.*

of the Legislature. *St. L. & C. R. R. Co. v. E. St. L. & C. R. R. Co.*,
354

6. The assignee of the lessee of a railroad track, using the same under the conditions of a lease duly entered into, is bound to pay the rent according to the terms thereof. *Id.*, 354

7. This court declines, in view of the evidence, to interfere with the judgment in behalf of the plaintiff in an action brought to recover a balance alleged to be due for the rental and use of its track and right of way by defendant company. *Id.*, 354

8. In the absence of proof to the contrary, the presumption is that the trunk of a passenger will arrive at his destination the same time he does, both starting upon a given trip at the same time. *St. L., A. & T. H. R. R. Co. v. Hawkins*, 406

9. The delivery of a check by a railroad company in exchange for one given thereto, is *prima facie* evidence of the receipt by it of certain baggage, and that the same was in good order. This presumption may be overcome as to its condition, by evidence to the contrary. *Id.*, 406

10. To release such company from liability for damage to such baggage, it must show that it was in substantially the same condition when delivered to its owner, as when received by it. *Id.*, 406

11. In an action to recover from a railroad company for injury to growing crops, alleged to have occurred through its negligence, this court holds: That the jury were justified in finding that its embankment and not an extraordinary flood caused the damage in question, and declines to interfere with the verdict for the plaintiff. *O. & M. Ry. Co. v. Ramey*, 409

12. A railway engineer seeing domestic animals approaching a crossing is not bound for that reason to stop or slow his train. *St. L. A. & T. H. R. R. Co. v. Russell*, 443

13. It is the duty of such engineer to slow or stop his train, when such stock is on the crossing or in such proximity thereto that a collision may be expected. *Id.*, 443

14. The engineer must, in such cases, use reasonable care and diligence in the management of his train to prevent injury to stock. *Id.*, 443

15. In an action brought for the recovery of damages for the alleged wrongful ejectment of plaintiff from a railroad train, this court holds, in view of the evidence, that the trial judge was guilty of no abuse of discretion during the trial thereof in the court below; that there was no error in the giving or refusing of instructions; and declines to interfere with the judgment for the plaintiff. *L. E. & W. Railroad Co. v. Christison*, 495

16. Whether or not the death of an animal, while being transported by a carrier, arose through the negligence thereof, is a question of fact for the jury. *Illinois C. R. R. Co. v. Light*, 530

17. It is ordinarily negligence to go upon a railroad track without

RAILROADS. *Continued.*

using the senses to ascertain as to the proximity of trains. *Wabash R. R. Co. v. Speer.* 599

18. A railroad company is liable for personal injuries arising from the frightening of a team standing a safe distance from a crossing, through the unnecessary sounding of the whistle of one of its engines. *Id.*, 599

19. It is as much the duty of a hand car crew upon approaching, with their car, a street crossing, the greater part of which is occupied by a standing train, to use such care as will prevent injury to themselves, as others approaching the same, having equal rights. *L. E. & W. Ry. Co. v. Wills,* 649

REAL PROPERTY.

1. Upon a bill in equity, filed by a defeated party (the defendant) in an ejectment suit to establish a lien and to recover for betterments on lots, which at the time most of the betterments were placed thereon were owned by a married woman who owned the reversionary interest in fee and whose title was of record and open to inspection, *held*, it being admitted that the case did not fall within the provisions of the ejectment law providing for the appointment of commissioners, etc., that the evidence failed to charge the defendants either with constructive fraud or with an estoppel, and that the bill could not be maintained. *Mettler v. Craft,* 193

2. The statute of this State in regard to allowance for betterments to a defeated party in ejectment was intended to cover the entire ground, especially in cases where the defeated defendant takes the initiative and the plaintiff makes no claim for rents and profits. *Id.*, 193

3. Upon the case presented it is *held*: That the appellant was a tenant in possession *per autre vie*, and that he was liable to the owner of the inheritance for waste permitted. *McDole v. McDole,* 274

4. Upon the question of the value of wood cut and sold from the premises, testimony of witnesses stating the amount of wood actually cut and sold outweighs that of witnesses estimating the value of the wood per acre. *Id.*, 274

5. In an action brought to recover for injury to farm land through the building of an embankment, whereby its drainage was obstructed, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Anderson v. Thiele,* 476

RECEIPTS—See NEGOTIABLE INSTRUMENTS, 1.

RECEIVERS—See INSOLVENCY, 2.

REPLEVIN.

1. In an action of replevin, this court holds that the jury were justified in finding that defendant had actual notice of the rights of plaintiff to the property in question before the levy was made; that notice to the officer holding the writs was notice to the attaching creditors; and declines to interfere with the judgment for the plaintiff. *O'Leary v. Bradford,* 182

REPLEVIN. *Continued.*

2. In an action of replevin, this court hold, the jury having been correctly instructed, and the evidence supporting the verdict, that the judgment for the plaintiff must be affirmed. *Westgate v. Aschenbrenner*, 263

3. No error of law appearing, and the evidence supporting the verdict, the judgment for the defendant must be affirmed. *Westgate v. Aschenbrenner*, 266

4. Under Sec. 123, Chap. 3, R. S., an action of replevin survives, and such survivorship applies in case of the death of the defendant as well as that of the plaintiff. *McCrory v. Hamilton*, 490

5. A judgment in such case, not that the property be returned to the defendant, but that he have a writ of *retorno habendo*, while informal, is not so defective as to be regarded as a nullity. *Id.*, 490

6. In an action of debt upon a replevin bond, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand. *Id.*, 490

SALES—See EVIDENCE, 2.

1. A purchaser of personal property, in order to acquire title thereto against creditors and *bona fide* purchasers of the vendor without notice, must reduce the property purchased to possession before the rights of such creditors or purchasers attach thereto. *O'Leary v. Bradford*, 182

2. The rule that a vendor can not rescind a sale on the ground of fraud without placing the vendee in *statu quo* is subject to exception, where the vendee has by his own acts put it out of the power of the vendor to place him in *statu quo*. *Wilson v. Challis*, 227

3. In an action on a contract for the sale of binding twine, which contained a guaranty of the quality of the twine sold, where the vendor claimed that the twine was not up to the guaranty, it is *held*: That the defendants had received all the allowance in the verdict and by *remittitur*, to which they were entitled under the evidence. *Luthy v. Waterbury*, 317

4. Under a clause in the contract which provided that in case of sales to others during the season at a less price than that fixed in the contract with defendants, the defendants should be entitled to a corresponding reduction, it is *held* That the evidence failed to show that sales had been made at a less price as claimed. *Id.*, 317

5. A clause in the contract provided that should the appellees, or another company named, sell twine during the season at a less price than that named in the contract, the appellees would make a corresponding reduction, *held*: That this clause did not apply to a sale already made, and second, that it had no reference to more favorable terms given to appellants by the other company named, by way of receiving back unsold twine at the end of the season. *Id.*, 317

6. The mere fact that witnesses may use the terms *sell* or *sale*, or that the parties to a given transaction used such terms, does not operate to make the same a sale, if upon consideration thereof it appears there was none. *McCrory v. Hamilton*, 490

SALES. *Continued.*

7. In an action brought to recover for articles sold, this court holds, in view of the evidence, that a person named was not liable as a partner of the purchaser, and that the judgment for the plaintiff can not stand. *Hess v. Keiser*, 493

8. In an action brought to recover for lumber sold and delivered, the contention being as to whether the defendant or a building contractor was liable therefor, this court declines, in view of the evidence, to interfere with the judgment for the defendant. *Johns v. McQuigg*, 609

SCHOOLS—See JURISDICTION, 5.

1. Neither party to a contract entered into between a school board and teacher, whereby the latter is employed to teach a certain school upon a salary named, is discharged from observing the conditions hereof by reason of the destruction of the school house, in the absence of any provision therein touching such possible occurrence. *Corn v. Board of Education*, 446

2. The inability of the school board to procure another building for school purposes would not in such case, in the absence of such provision, absolve it from a liability for salary. *Id.*, 446

SET-OFF—See PRACTICE, 46.

1. The claim of a plaintiff in a given case for unliquidated damages arising out of a tort, totally disconnected from the defendant's claim against the plaintiff, upon a note on which suit had been previously brought, is not such a claim or demand as should have been brought forward and adjusted in the suit upon said note. *Caldwell v. Evans*, 613

SPECIAL FINDINGS—See PERSONAL INJURIES, 4.

SPECIFIC PERFORMANCE.

1. Chancery will not entertain a bill to specifically enforce contracts relating to personal property, nor contracts which by their terms call for a succession of acts whose performance can not be consummated by one transaction, and which require protracted supervision and direction. *Grape Creek Coal Co. v. Spellman*, 630

STATUTES.

1. An act in derogation of common right must be strictly construed so far as it places restraint upon any useful and lawful calling. *Carberry v. People*, 506

STOCKS—See JURISDICTION, 8; RAILROADS, 11, 12, 13.

SUBROGATION—See INSURANCE, 3.

TAXES—See MUNICIPAL CORPORATIONS, 22; OFFICERS, 3.

TRESPASS.

1. In the absence of a defense, evidence in a suit of trespass *quare clausum fregit*, that the *locus in quo* has been in the undisputed possession of the plaintiff for over fifty years, and that defendant has encroached thereon by building a fence, doing no other damage, will

TRESPASS. *Continued.*

warrant a recovery of at least nominal damages. *Johnson v. Stinger.* 180

2. In the case presented, this court holds that the defendant has failed to show a good defense, and that the judgment in his favor can not stand. *Id.*, 180

3. An arrest by a private person without process is a trespass, if no criminal offense was committed or attempted in his presence, whether he had probable cause or not, to believe the person arrested guilty, and counts in trespass in the declaration in an action based thereon, need not contain the averment that the alleged arrest was "without any reasonable or probable cause." *Sundmacher v. Block,* 553

4. An action of trespass may be supported against a person, not being an infant or *feme covert*, who afterward assents to a trespass committed for his benefit. *Id.*, 553

5. Also against all who aided or abetted in committing the same. *Id.*, 553

TRUST DEEDS—See GAMING, 1.

WILLS.

1. The intention of a testator, if not inconsistent with the rules of law, must govern in the construction of a given will. *Sheets v. Wetzel,* 600

2. It is the general rule that when the use of money is given to one for life, with remainder over to another, the former has no right to the possession of the money so bequeathed, but it should be put at interest, the interest paid to the tenant for life and the principal retained for the remainder-man. *Id.*, 600

3. In the case presented, this court construes several clauses of the will involved, affirming in part and reversing in part the decree of the trial court therein, with directions to amend the same. *Id.*, 600

WITNESSES—See PRACTICE, 44, 45.

1. To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see from the nature and circumstances of the evidence, which the witness is asked to give, that there is reason to apprehend injury if he is compelled to answer, and where that is made to appear, much latitude will be allowed him in determining the effect of any particular question. The danger to be apprehended must be real and not imaginary. *Minter v. The People,* 438

2. The law will not permit a man to keep the names of those who violate the law, and their offenses, secret, because of a fear that they might give evidence in their turn against him. *Id.*, 438

3. Testimony going to show that the witness giving it, had seen a certain person play cards for money, does not furnish or tend to furnish evidence against such witness of a criminating character, nor will the fact that the witness was engaged in the game excuse him from answering. *Id.*, 438

4. The leading facts of a case should be presented hypothetically.

WITNESSES. *Continued.*

before asking an expert witness how much loss of time would be caused by mechanics changing from one kind of work to another. *Id.*, 532

5. The credit of a witness may be impeached by proof that he has made statements out of court contrary to what he testifies at a given trial. *Kerr v. Hodge*, 546

6. Such proof should be permitted to go to the jury, and they should be told to consider it in determining what credit and force shall be given a witness under such circumstances; but they should not be instructed that they can rightfully disregard the entire testimony of a witness for that reason, unless corroborated. *Id.*, 546

Conf. J. L.

